Supreme Court, U.S.
FILED

961737 APR 28 1997

OFFICE OF THE CLERK

No. (1)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GORDANA SWANSON,

Petitioner,

vs.

DON KNABE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

By dismissing petitioner Gordana Swanson's lawsuit under California's SLAPP statute because she was a rival political candidate, and without giving her any opportunity to take discovery,

1. Did the California courts violate Swanson's constitutional rights of free speech and petition, by focusing on her status as a rival political candidate rather than on respondent Don Knabe's alleged wrongful conduct?

2. Did the California courts also violate Swanson's due process and jury trial rights by denying her any discovery whatsoever, despite a necessary witness's stated desire to testify and produce documents under subpoena?

3. Is the California SLAPP statute unconstitutional on its face (especially since the New Hampshire Supreme Court has already held that draft legislation modeled on California's statute would in fact be unconstitutional), and should certiorari be granted to resolve the growing conflict among the states on the constitutionality of SLAPP statutes?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

Petitioner Gordana Swanson and respondent Don Knabe are individuals, and were rival candidates in the 1996 Los Angeles County Board of Supervisors election. (Swanson lost; Knabe won.)

It is possible that 28 U.S.C. §2403(b) may apply and so this Petition has also been served on the California attorney general pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(c), since this Petition puts the constitutionality of California's SLAPP statute into question.

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GORDANA SWANSON,
Petitioner,

vs.

DON KNABE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Gordana Swanson ("Swanson") respectfully petitions for a writ of certiorari to review the order of the Supreme Court of the State of California denying Swanson's Petition for Review entered in this matter on January 28, 1997.

OPINIONS BELOW

The trial court's orders denying Swanson any opportunity to take discovery, and eventually dismissing Swanson's claims, are attached as Appendices "A" through "D"; the California Court of Appeal's decision affirming the dismissal, and its subsequent order modifying that decision, are attached respectively as Appendices "E" and "F"; and the California Supreme Court's order denying Swanson's petition for review is attached as Appendix "G". None of these rulings

is reported.

JURISDICTION

The California Supreme Court entered its order denying Swanson's petition for review on January 28, 1997. This Court has jurisdiction to review that order by writ of certiorari under 28 U.S.C. §1257(a), since the California courts' application of California's SLAPP statute is unconstitutional, and therefore "repugnant to the Constitution . . . of the United States." Certiorari could also be properly granted under Supreme Court Rules 10(a) and 10(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:
"Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people . . . to petition the Government for a redress of grievances."
U.S. Const., 1st Am.

The Fifth Amendment to the United States Constitution provides in relevant part:
"No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."
U.S. Const., 5th Am.

The Fourteenth Amendment to the United States Constitution provides in relevant part:
"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."
U.S. Const., 14th Am., §1.

The text of California's SLAPP statute, California Code of Civil Procedure ("CCP") §425.16, is attached as Appendix "J" pursuant to Supreme Court Rule 14.1(f).

STATEMENT

Introduction

This Petition questions the constitutionality of California's SLAPP statute, and involves the conflict between a plaintiff's constitutional rights to pursue a lawsuit in a political context, and the abbreviated litigation schedule created by the SLAPP statute. Certiorari is necessary in this case not just to protect petitioner Swanson's constitutional rights, but also to protect the public's rights of free speech, petition, jury trial and due process in the application of California's new SLAPP statute. Indeed, the provisions of California's SLAPP statute have already been found to be unconstitutional by the New Hampshire Supreme Court, in reviewing the validity of proposed legislation modeled on the California statute. *Opinion of the Justices*, 138 N.H. 445, 450-51, 641 A.2d 1012, 1014-15 (1994).

Petitioner Gordana Swanson and respondent Don Knabe were rival political candidates in a California election, and Swanson brought this lawsuit because one of Knabe's political associates told her that Knabe was taking bribes. Because Swanson has standing under California's Political Reform Act, she sued Knabe for taking bribes based on this information, but was prevented by the California courts from taking any discovery at all, which led to the dismissal of her case under the SLAPP statute.

In depriving Swanson of any opportunity to take discovery, the California courts violated her due process rights; and in focusing on her status as a rival political candidate rather than on Knabe's alleged wrongful conduct, the California courts violated Swanson's free speech and petition rights. Moreover, the SLAPP statute is unconstitutional on its face, since it allows judges to weigh disputed factual issues on a pretrial motion and grant judgment without any of the due process

limitations of a summary judgment procedure. For these independent reasons, certiorari is necessary not just to protect Swanson's constitutional rights, but also to protect the public's rights under SLAPP statutes generally, given their proliferation across the country.

By trying to protect a defendant's constitutional rights against bad-faith litigation, SLAPP statutes have a laudable goal, but the overbroad application of the California SLAPP statute in this case subverted that goal by sacrificing Swanson's own constitutional rights as a plaintiff. Thus, although Swanson's lawsuit alleged that Knabe took bribes in violation of California law, the California courts allowed Knabe to avoid any discovery and eventually to dismiss the case -- even though Swanson filed her lawsuit because one of his former associates specifically said he was taking bribes. Because Knabe was a rival political candidate, the California courts held this lawsuit was subject to the SLAPP statute, finding that -- as a general matter -- "[t]here is a real potential for retaliatory minded political contestants to artfully plead around C.C.P. section 425.16 [the SLAPP statute] and embark on expensive discovery, thereby diverting the opposing candidate's time and financial resources during a political race." Appendix "D" at p. 5a. *See* Appendix "E" at p. 14a.

If the California courts are right, then any lawsuit relating to a political campaign is subject to the SLAPP statute, even if it involves a mere breach of contract or a simple tort such as battery. It would be absurd to argue that a politician could not be sued for shooting someone just because he pulled the trigger while making a campaign speech -- yet that case would also "divert the [defendant] candidate's time and financial resources during a political race," just as much as this lawsuit alleging illegal bribes. Thus, a lawsuit cannot be constitutionally restricted by the SLAPP statute just because it would "divert the opposing candidate's time and financial resources during a political race" -- any lawsuit filed in connection with a political race would do that, which would render California's Political Reform Act or any other reform statute meaningless.

Swanson has never said her claims under the Political Reform Act should somehow be "exempt" from the SLAPP statute. Instead, all she has ever asked is that she be given the same opportunity as any other plaintiff seeking to enforce the political reform act's proscription on bribery, and that she be allowed to take some discovery on this issue which was first disclosed to her by one of Knabe's political associates.

In this era of intense public interest in questionable political contributions, Swanson should have been allowed to pursue her information and take discovery on whether Knabe was taking bribes as a public official. This Court has noted that "[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907). *See also NAACP v. Button*, 371 U.S. 415, 430 (1963) ("litigation may well be the sole practicable alternative open to a minority to petition for redress of grievances").

This case is in many ways reminiscent of the foundational libel trial of John Peter Zenger, who attacked a government official and as a result was almost railroaded by a local court. Early American lawyer Alexander Hamilton told Zenger's jury that "it is a duty which all good men owe to their country to guard against the unhappy influence of ill men when entrusted with power," and helped create the right of free speech by urging them to acquit Zenger and thereby "secur[e] to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right -- the liberty -- both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth." J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, at pp. 90, 99 (1963).

Over 250 years later, the application of California's SLAPP statute in this case has done much to harm this right by depriving a political candidate of her rights of petition, free speech, jury trial, and due process -- which harm can only be remedied by granting certiorari.

The Underlying Litigation

Petitioner Gordana Swanson and respondent Don Knabe were rival candidates in the 1996 Los Angeles County supervisor election campaign, and Swanson's lawsuit alleged that Knabe had taken illegal bribes in violation of California's Political Reform Act. *E.g.*, First Amended Complaint ¶¶ 1, 7-10 (AA59-61).[1]/ The Political Reform Act gave Swanson standing to file her suit, since it creates a private right of action under California Government Code § 87100 prohibiting bribes.[2]/

Swanson's bribery allegations against Knabe were based on several meetings between Swanson's campaign consultant Ron Smith and "Dan Wooldridge, the former partner of defendant Don Knabe's campaign consultant Harvey Englander." Smith Decl. ¶¶ 1-2 (AA75). As Smith testified by declaration:

> "During these meetings, Mr. Wooldridge told me that Mr. Englander had funneled large sums of money, probably over $25,000 and perhaps as much as $100,000, to Don Knabe by means of phony payments

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[1]/ Citations to "AA" are to the Appellant's Appendix filed with the California Court of Appeal in this matter, and are cited pursuant to Supreme Court Rule 12.7.

[2]/ One unstated concern which apparently bothered the California courts was the possibility that Swanson might be using her lawsuit solely in order to obtain a political advantage in her election campaign against Knabe. In fact, Swanson is continuing to attempt to press her claims through this petition although she lost the election last November, because she is truly concerned even more as a citizen than as a candidate about the information which she received about Knabe's bribe-taking activities. *See* Swanson's Petition for Review dated December 2, 1996, at p. 5.

> to a dummy company called 'JDK Associates' or 'J.D. Knabe & Associates' controlled by Mr. Knabe's wife, Julie Knabe. Mr. Wooldridge also told me that he had written evidence to back up his statements, and he briefly showed me a copy of a ledger page showing payments to Ms. Knabe's company."

Id. at ¶2 (AA75). Smith further said that he had "tried to obtain a written statement from Mr. Wooldridge to this effect, and . . . also tried to get copies of his supporting documents, but he told me that he would be willing to respond only to a subpoena." *Id.*

Proceedings Before The Trial Court

Swanson filed her lawsuit based on this information obtained from Knabe's former affiliate Wooldridge about "phony payments to a dummy company . . . controlled by Mr. Knabe's wife." *Id.* Swanson sued Knabe under California's Political Reform Act for "us[ing] his official position to influence governmental decisions in which he knows or has reason to know he has a financial interest":

> "For example, Plaintiff is informed and believes, and therefore alleges that Knabe has voted on and continues to influence boards and commissions such as the Rapid Transit District/Metropolitan Transportation Authority, using that position to receive bribes and cash payments, including cash payments through his wife's company of at least $25,000 from a lobbying firm controlled by a lobbyist named Harvey Englander, which cash payments Knabe has diverted to his personal use."

First Amended Complaint ¶¶7-8 (AA60-61). *Accord*, Complaint ¶6(B) (AA6).

Since Wooldridge said "he would be willing to respond only to a subpoena" (Smith Decl. ¶2; AA75), Swanson also promptly noticed the relevant depositions. These depositions were of Wooldridge and his partner Pierson; Englander, who allegedly "funneled" the money; three banks which held Englander's business bank accounts; Julie Knabe, who allegedly "controlled" the "dummy business"; and Knabe himself. Smith Decl. ¶3 (AA75). *See* Notices of Deposition and Consumer Notice, all dated November 14, 1995 (AA49-A1 - 49-I17).

Knabe responded with a motion to strike Swanson's claims under the California SLAPP statute. Special Motion to Strike Plaintiff's Complaint, dated November 14, 1995 (AA8); Amended Notice of Special Motion to Strike Plaintiff's Complaint, dated November 17, 1995 (AA33). Knabe also applied ex parte for a temporary restraining order to stop Swanson from proceeding with any of her noticed discovery. Ex Parte Application dated November 26, 1995 (AA37).

Swanson opposed Knabe's ex parte application to restrain discovery, by pointing out that the automatic stay of discovery provision of the SLAPP statute, CCP § 425.16(g), did not apply because Knabe's SLAPP motion did "not even address plaintiff's claim under Government Code § 87100 [*i.e.*, the Political Reform Act's bribery provision], and so there is no reason to stay discovery in this matter while everyone waits for the hearing on defendant's defective motion." Opposition to Ex Parte Application, dated November 27, 1995 (AA51). Swanson also noted that Knabe was just trying to delay discovery, since he had "scheduled the [SLAPP] motion for hearing on [a date] almost a month after it was filed." *Id.* (AA50) (emphasis added). Yet the trial court ignored Swanson's objections, and stayed all her discovery until after the ruling on Knabe's motion to strike. Appendix "A" at p. 1a.

Swanson filed her opposition to Knabe's SLAPP motion, and cross-moved for leave to take her eight noticed depositions under CCP § 425.16(g) of the SLAPP statute (AA70); she also applied ex parte for an order shortening time on her motion for leave to take the noticed depositions. Ex Parte Application dated December 7, 1996 (AA65). In an unusual hearing, the trial court not only denied Swanson's ex parte application, but also *sua sponte* considered and denied Swanson's pending motion for leave to take discovery on the merits:

> "Overruling Plaintiff's counsel's objections, the Court immediately heard Plaintiff's motion for leave to take discovery on the merits. The Court then denied Plaintiff's motion for leave to take discovery on the merits on the grounds that the requested discovery was not sufficiently specified by the Smith Declaration attached to Plaintiff's ex parte application, and also on the grounds that it would be improper to allow Plaintiff to take the eight depositions specified by the notices previously lodged with the Court. Plaintiff's counsel requested leave to take more limited discovery, but his offer was rejected by the Court. The Court then denied Plaintiff's ex parte application for an order shortening time on plaintiff's motion for leave to take discovery, on the grounds that the Court had already denied such motion on the merits at that same hearing."

Notice of Ruling dated February 6, 1996 (AA83-84) (emphasis added). *See also* Appendix "B" at p. 2a.

Even though the trial court had denied Swanson's oral "request [for] leave to take more limited discovery" (*id.*), Swanson immediately filed a new motion for leave to take discovery, this time requesting leave to take only four depositions, namely the depositions of just Wooldridge and the three banks, and pointed out that the court's denial

of any opportunity for her to take discovery violated her constitutional rights. Motion for Leave to Take Discovery, dated December 12, 1995 (AA87). As Ron Smith testified in his new declaration, "Mr. Wooldridge told me that most of the bribes at issue were funneled to Knabe by payments to his campaign manager Harvey Englander," and so "at the very least," Swanson needed to depose "Dan Wooldridge and the three banks which formerly held Mr. Englander's bank accounts." Smith Decl. ¶3 (AA93). *See* Notices of Deposition dated December 12, 1995 (AA94-132). Yet the trial court denied this more limited request as well. Appendix "C" at p. 3a. *See also* Appendix "D" at pp. 6a-7a.

Meanwhile, Knabe's original SLAPP motion had gone off-calendar. Notice of Ruling dated December 19, 1995, at pp. 1-2 (AA134-35). Knabe filed a new SLAPP motion to stay discovery, and again scheduled the motion to be heard almost a month later. Special Motion dated December 26, 1995, at p. 1 (AA137). Swanson duly filed her opposition to Knabe's motion, asking that it be denied on California state law grounds, and also that it be denied or at least continued on constitutional grounds because Swanson had been prevented from taking any discovery at all. *See* Appendix "H" at pp. 27a-29a (excerpts).

Astonishingly, Knabe's reply brief attached a declaration by Dan Wooldridge controverting the Smith declarations previously filed with the court (AA216-17) -- thus putting directly into issue the credibility of the very person whom Swanson had desperately been trying to depose for months, and whom the trial court had just as steadfastly refused to let her depose.

Swanson immediately filed a third Smith declaration, which attached a memo from Wooldridge confirming that "the money Harvey [Englander] paid to Don [Knabe] was a commission or payoff for hiring him. It's commonly called a kickback or an under the table payment for services rendered":

> "Harvey over an extended period of time -- spanning at least two years -- paid Knabe (using his wife's consulting firm) thousands of dollars . . . . I cannot determine how much money Harvey may have paid Don, but it was a sizeable amount given the regular checks going to him. My hunch is that it was between $30,000 and $100,000."

AA241-42 (emphasis added).[3/] As Smith said in his new declaration, "[w]hile Ms. Swanson attempted to depose Mr. Wooldridge on the very issue he discussed with me and confirmed in [his] memorandum, Mr. Knabe prevented that deposition from proceeding. Mr. Wooldridge's current declaration shows that there are serious credibility issues which clearly warrant Ms. Swanson's taking of Mr. Wooldridge's deposition." Smith Decl. ¶3 (AA240).

Yet once again the trial court rejected Swanson's plea for discovery, and dismissed Swanson's claims without giving her a single opportunity to take discovery. Appendix "D" at pp. 6a-7a. In other words, the court dismissed Swanson's lawsuit with prejudice without allowing her to take a single deposition, or to subpoena a single document, or to take any other discovery to substantiate Wooldridge's statements.

[3/] The trial court ignored the bribery parts of Wooldridge's memo, but specifically noted that Wooldridge said "the point is to dirty up [the defendant]" and "we obviously can't prove much of this." Appendix "D" at p. 6a. Despite the court's apparent assumption that these statements could be imputed to Swanson, they are plainly just Mr. Wooldridge's own suggestions on other issues, and there is no evidence that Swanson or any of her affiliates followed or adopted any of these other suggestions. AA241-42. In fact, they just highlight why the California courts should have allowed Swanson to depose Wooldridge.

Review By The California Court of Appeal and Supreme Court

The California Court of Appeal affirmed the trial court's dismissal on October 22, 1996, primarily on the grounds that Swanson's lawsuit somehow infringed Knabe's First Amendment rights, and that Swanson was properly denied any opportunity to take discovery under the SLAPP statute because her requested discovery was supposedly "overbroad." This appellate decision is attached as Appendix "E." Since the appellate opinion raised Swanson's candidacy as a reason for dismissing her claims, Swanson filed a petition for rehearing which objected on free speech and right to petition grounds. *See* Appendix "I" at pp. 30a-33a (excerpts). The appellate court denied Swanson's petition for rehearing. Appendix "F."[4]/

On January 28, 1997, the California Supreme Court denied Swanson's petition for review. Its order is attached as Appendix "G."

REASONS FOR GRANTING THE WRIT

Certiorari should issue for any of three independent reasons:

First, the California courts discriminated against Swanson by imposing a more stringent burden on her as a rival political candidate under the SLAPP statute. But Swanson's First Amendment rights include her right of access to the courts to pursue litigation. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513

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[4]/ Swanson's rehearing petition also objected that the appellate opinion contained a factual misstatement in its sentence that "[a]t oral argument, Swanson's counsel argued, for the first time, that the discovery requests were limited to obtaining information about money paid to Knabe by persons appearing before the Metropolitan Transit Authority, and this related to the allegations in the amended complaint." Appendix "E" at p. 23a. This statement was modified by the court's modification order. *See* Appendix "F" at p. 25a.

(1972). Thus, the California courts violated Swanson's rights of petition and free speech, requiring review not just for Swanson's sake but also to clarify the obligation of California's and other states' SLAPP statutes to respect the public's constitutional rights.

The deprivation of Swanson's free speech rights applies with special force to these facts, since "the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). Indeed, the California appellate court specifically cited the *Buckley v. Valeo* case to support its decision (Appendix "E" at p. 17a), showing that certiorari is appropriate because its ruling "was based squarely upon its interpretation of federal law." *Arizona v. Evans*, 514 U.S. __, 115 S.Ct. 1185, 131 L.Ed.2d 34, 43 (1995).

Second, certiorari should be granted for the independent reason that Swanson was precluded from taking any discovery at all -- discovery which would have allowed her to try to show the alleged bribes which Knabe accepted. This Court has held that a premature summary judgment motion cannot be granted without allowing the responding party an opportunity to take necessary discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). *Accord, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (summary judgment should "be refused where the nonmoving party has not had the opportunity to discovery information that is essential to her opposition"). Thus, Swanson's due process rights were violated by dismissing her claims without allowing her to take any discovery at all.

Third, the California SLAPP statute is unconstitutional on its face, as shown by the recent holding by the New Hampshire Supreme Court that draft legislation based on the California statute would deny meaningful access to the courts by a plaintiff. *Opinion of the Justices, supra*, 138 N.H. at 450-51, 641 A.2d at 1014-15. Certiorari should issue to resolve this conflict between the states, and to provide guidance on the constitutionality of SLAPP statutes generally, since

"[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

QUESTION NO. 1:

The California Courts Violated Swanson's Free Speech and Petition Rights, By Focusing On Her Status As a Rival Political Candidate Rather Than On Knabe's Alleged Wrongful Conduct.

The California courts' rulings discriminate against Swanson as a political candidate, and violate her constitutional rights of petition and free speech by refusing to allow her reasonable access to the courts to pursue her claims under the Political Reform Act. The California SLAPP statute restricts only those "cause[s] of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California constitution in connection with a public issue." CCP §425.16(b). *See* Appendix "J" at p. 34a. Thus, any determination whether a lawsuit is a SLAPP suit must focus on the nature of the defendant's "act . . . in furtherance of the person's right of petition or free speech," rather than on the status or identity of the plaintiff.

Unfortunately, the California courts focused on Swanson's status as a rival political candidate rather than on the nature of the defendant's conduct to determine that Swanson's lawsuit is a SLAPP suit, an application of California's SLAPP statute which is unconstitutional on its face. This requires review by certiorari.

As the California courts concede, "[t]he issue of whether a candidate for public office has received illegal gifts or public bribes is a legitimate issue of public concern" (Appendix "E" at 17a), and "the public must, of course, be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office." *Id., citing Matson v. Dvorak*, 40 Cal.App.4th 539, 548-550 (1995) ("It

is axiomatic that the qualifications of a declared candidate for public office is a public issue."). *See also Buckley, supra*, 424 U.S. at 15 ("the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office").

This is why Swanson filed her lawsuit in the first place. The California Political Reform Act is designed to end government corruption, for example by making bribes illegal. California Government Code §87100. It creates a private right of action to encourage citizens to file lawsuits to expose such corruption. *Id.* at §91005(b). Swanson's lawsuit is just such an action, and seeks to stop defendant Don Knabe ("Knabe") from violating the conflict of interest provisions of the California Political Reform Act by taking bribes. *E.g.*, First Amended Complaint ¶¶7-10 (AA60-61).[5/]

Unfortunately, the California courts confused Swanson's and Knabe's respective First Amendment rights. For instance, the appellate opinion notes that "[p]ublic discussion about the qualifications of those

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[5/] Swanson's lawsuit did not claim Knabe's running for office was itself illegal, nor did it seek any relief which would shut down his election campaign. Instead, the lawsuit merely alleged that Knabe was taking illegal bribes, and sought monetary and injunctive relief relating to those bribes. First Amended Complaint ¶¶ 7-13 (AA61-62).

Clearly, neither taking nor accepting bribes is constitutionally protected, and Knabe's "free speech rights as a public employee and candidate" are not infringed by enforcing a statute which restricts his ability to take bribes. *See Fair Political Practices Comm'n v. Superior Court*, 25 Cal.3d 33, 49 (1979) (holding that the California Political Reform Act's "limitation[s] on gifts do not constitute substantial limitations on petition and speech rights"). Indeed, the acronym "SLAPP" stands for "Strategic Lawsuit Against Public Participation" -- and taking bribes is not any kind of protected "public participation."

who hold or who wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment." Appendix "E" at p. 17a. Swanson respectfully suggests that the only reasonable reading of this language is to protect her First Amendment rights to explore the qualifications and alleged bribe-taking activities of Knabe as a candidate for political office. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (recognizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *Matson, supra*, 40 Cal.App.4th at 548 ("the public must . . . be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office").

Instead, the appellate opinion says "Knabe's fundraising efforts raised a question of public interest," and are therefore "entitled to the benefits of section 425.16." Appendix "E" at p. 17a. This led to the topsy-turvy result that a politician who is accused of taking bribes has First Amendment rights in his "fundraising efforts" which supposedly outweigh the public's right under the First Amendment to "be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office." *Matson, supra*, 40 Cal.App.4th at 548. This is not logical, and cannot be the law.

It is undisputed that the California Political Reform Act is a valid statute,[6/] and it makes no sense to dismiss Swanson's claims under the SLAPP statute when all she did was pursue her rights under this

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[6/] The California Supreme Court has ruled in another case that a politician's "fundraising efforts" cannot outweigh the purposes of the California Political Reform Act, since its "limitation[s] on gifts do not constitute substantial limitations on petition and speech rights." *Fair Political Practices Comm'n, supra*, 25 Cal.3d at 49 (rejecting politician's argument that financial discovery would violate his petition and free speech rights).

constitutional statute. *See Cameron v. Johnson*, 390 U.S. 611, 619 (1968) ("Any chilling effect . . . that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms."); *see also Edmondson & Gallagher v. Alban Towers Tenants*, 829 F.Supp. 420, 426 (D.D.C. 1993) ("if a person has a protected right to bring an objectively-based antitrust claim against a competitor [under the *Noerr-Pennington* doctrine], the same protection must be afforded to others who bring other such objectively-based claims and allegations before a government agency or court").

If a private citizen who was not a rival political candidate had filed the underlying action against Knabe to expose his bribes, there would plainly have been no basis to dismiss that person's lawsuit, since the Political Reform Act's "limitation[s] on gifts do not constitute substantial limitations on petition and speech rights." See above at p. 16 n.6. But the law should not concern itself with the question whether a plaintiff may be a politician, a developer, or a private citizen, and in fact the SLAPP statute says it looks only to the defendant's conduct which is alleged to be wrongful in the complaint. CCP §425.16(b). *See* Appendix "J" at p. 34a.

Obviously a sham lawsuit merits no constitutional protection. But there was no evidence that Swanson's claims were sham or made in bad faith. Instead, the California courts drew an unsupported inference from the parties' rival candidacies that Swanson's lawsuit was solely politically motivated, and effectively placed Swanson in a special category by assuming that her status as a rival political candidate made her lawsuit a SLAPP suit. *E.g.*, Appendix "E" at p. 14a (appellate court's quoting trial court's statement that "[t]here is a real potential for retaliatory minded political contestants to artfully plead around C.C.P. section 425.16 [the SLAPP statute] and embark on expensive discovery, thereby diverting the opposing candidate's time and financial resources during a political race.").

By focusing on her status as a rival political candidate, the California courts violated her constitutional rights by punishing her for that status. Certiorari is thus necessary because the right to petition encompasses the right to sue (*California Motor Transport, supra*, 404 U.S. at 510), and "[t]he right to sue . . . lies at the foundation of orderly government." *Chambers, supra*, 207 U.S. at 148. Indeed, "[t]he very idea of government, republican in form, implies a right of the part of its citizens . . . to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1895).

Moreover, the right of free speech applies "precisely to the conduct of campaigns for political office" (*Buckley, supra*, 424 U.S. at 15), and "those engaged in political debate are entitled not only to speak responsibly but to . . . speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 674 (1944). A primary purpose of the First Amendment is to assure an "unfettered interchange of ideas for the bringing about of political and social change." *New York Times, supra*, 376 U.S. at 269. By depriving Swanson of any opportunity to pursue her claims that Knabe was taking bribes, the California courts have effectively shut down this "unfettered interchange of ideas."

Swanson's decision to file a Political Reform Act lawsuit against a powerful and corrupt local politician like Knabe is every bit as courageous in its own way as John Peter Zenger's attacks on the evil governor of New York in the eighteenth century, which helped create the First Amendment. This case has done a lot to destroy those rights in the California political arena, and certiorari should be granted.

QUESTION NO. 2:
The California Courts Also Violated Swanson's Due Process and Jury Trial Rights By Denying Her Any Discovery Whatsoever

Certiorari should also be granted for the independent reason that the California courts violated Swanson's due process rights by not

allowing her to pursue her claims at all, or to take any discovery whatsoever, unless she first proved by admissible evidence facts to support her complaint's bribery allegations. Appendix "E" at pp. 18a-19a; Appendix "D" at p. 6a. Neither Swanson nor anybody else on her campaign staff gave Knabe any bribes, and it was unfair and violated her due process rights to force her to an evidentiary standard of proving bribes without discovery, which no plaintiff could meet.

Indeed, it violated Swanson's constitutional rights to force her to prove Knabe's bribes through admissible evidence without allowing her to take any discovery at all. While the Smith declarations set forth allegations concerning the bribes, and Swanson was informed and believes that the bribes actually took place (*see* Smith Decl. ¶ 2), the eyewitness who could expose Knabe's illegal conduct declined to testify absent a subpoena. *Id.*

Thus, because of the necessity for subpoenas, discovery was necessary -- and as this Court has held in the analogous context of a premature summary judgment motion, a dispositive motion must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition." *Anderson v. Liberty Lobby, supra*, 477 U.S. at 250 n.5. [7/]

[7/] All the discovery which Swanson sought was necessary for her to oppose Knabe's SLAPP motion, since the California courts required her to prove a probability of success on the merits through non-hearsay evidence. Appendix "E" at pp. 18a-19a. The requests sought information to show that most of the bribes at issue were funneled to Knabe by payments to his campaign manager Harvey Englander who then passed them on to a dummy business called "JDK Associates" or "JD Knabe & Associates" controlled by Knabe's wife. Smith Decl. ¶ 2 (AA75); *see* First Amended Complaint ¶ 8 (AA61). Each of the depositions sought was necessary to obtain this information. Smith Decl. ¶3 (A75).

A summary judgment motion is limited by numerous due process limitations, such as requiring the nonmoving party to have an opportunity to take necessary discovery, and forbidding the trial court from resolving the merits of disputed factual claims. SLAPP motions are not generally bound by these limitations, for instance by allowing a trial court to weigh disputed factual issues. Thus, other states have recognized that although SLAPP statutes are designed to protect a defendant's constitutional rights, an overbroad SLAPP procedure "would seem to extend to these activities a broader protection than the constitution itself provides," and would deny a plaintiff her right of "access to the courts." *Florida Fern Growers Ass'n v. Concerned Citizens of Putnam County*, 616 So.2d 562, 570 (Fla. 1993).

Yet that is exactly what the California courts have done in this case, and this conflict among the states requires a grant of certiorari. *See Braxton, supra*, 500 U.S. at 347 ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the . . . state courts concerning the meaning of provisions of federal law.").

The California courts tried to avoid this issue by holding that Swanson was properly denied any discovery because her discovery was supposedly overbroad, and purportedly "demanded 'any and all documents' related to an extensive list of, inter alia, communications, bank accounts, campaign contribution records, checks and payments." Appendix "E" at p. 20a. Unfortunately, the courts focused on Swanson's original discovery requests, which were served before Knabe's SLAPP motion was filed. Although Swanson subsequently brought two motions for leave to take more limited discovery, the California court erroneously dismissed her subsequent discovery requests as "identical to the first document request." *Id.* at p. 23a.

But Swanson's discovery which she sought leave to take did not focus on "an extensive list of, inter alia, communications, bank accounts, campaign contribution records, checks and payments." Most

of her requested deposition notices were directed toward three banks, from whom she merely requested "checks," "drafts," and "payments" drawn on Knabe's campaign manager Harvey Englander's or his companies' bank accounts, and made payable to Knabe, his wife, or the two "dummy compan[ies]" named by third-party witness Dan Wooldridge (AA98-99, 106-07, 114-15). (Englander was fingered by Mr. Wooldridge as the person who "funneled large sums of money . . . to Don Knabe." Smith Decl. ¶2 (AA93).)

Swanson also sought leave to take the deposition of Mr. Wooldridge himself. Although her document request to Mr. Wooldridge did seek the types of documents listed in the Opinion (*see* AA120-22), Mr. Wooldridge had stated that he would produce his incriminating documents on Knabe only in response to a subpoena (AA75), and it would have been risky to serve a limited subpoena on Mr. Wooldridge which might not reach all of the relevant documents in his possession. In any event, since Mr. Wooldridge had stated his willingness to respond to the subpoena (*id.*), it was not oppressive to serve a more extensive document request upon him, especially since it relates to the matters identified in his memo to Ron Smith (AA241-42).

Under these circumstances, Swanson tried to limit her discovery to comply with the SLAPP statute -- and to the extent that the California courts found the Wooldridge document request was overbroad, they should still have allowed the bank document requests to go forward. Indeed, it is hard to see how the bank document requests could be more specifically drafted, since they seek precisely the payment "funneling" information identified by Mr. Wooldridge.

A plaintiff's constitutional rights should not be trumped by California's (or any other state's) SLAPP statute. Although California courts sometimes say they would "authoriz[e] reasonable and limited discovery timely petitioned for by a plaintiff" (*Lafayette Morehouse, Inc. v. Chronicle Pub. Co.*, 37 Cal.App.4th 855, 867-68 (1995)), the plain fact remains that Swanson is unaware of a single reported

California case which has actually held that a plaintiff should be allowed to take discovery, or which has reversed a SLAPP dismissal for lack of discovery or other due process reasons. Thus, even if the California SLAPP statute could be construed to be constitutional, it is not being construed that way by the California courts. It would be a legal fiction to pretend there is no problem in a practical sense.

Certiorari should therefore issue because the SLAPP statute is unconstitutional as it has been applied by the California courts in this action. Certiorari is necessary to protect Swanson's and any other California plaintiff's constitutional rights.

QUESTION NO. 3:
California's SLAPP Statute Is Unconstitutional On Its Face, And Certiorari Is Necessary To Resolve A Conflict Among The State Courts About The Constitutionality Of SLAPP Statutes

As part of an attempt to restrict abusive litigation, SLAPP statutes are spreading across the country. But in their concern to protect a defendant's rights, some states (such as California) have undermined a plaintiff's constitutional rights. *See Florida Fern Growers, supra*, 616 So.2d at 570 (noting that an overbroad SLAPP application "would seem to extend to [a defendant's] activities a broader protection than the constitution itself provides").

The conflict between different states on the constitutionality of SLAPP statutes is dramatically shown by a recent opinion of the New Hampshire Supreme Court, which examined a proposed SLAPP statute modeled on the California version, and found that it would be unconstitutional. *Opinion of the Justices*, 138 N.H. 445, 641 A.2d 1012 (1994). Although the New Hampshire Supreme Court primarily focused on a plaintiff's right to a jury trial under the New Hampshire Constitution, it also dealt with a plaintiff's rights of access to the courts (*id.*), a concern which was echoed by the Florida Supreme Court in its *Florida Fern Growers* case. 616 So.2d at 570.

In contrast, the California courts have repeatedly upheld the constitutionality of the provisions of California's SLAPP statute. *E.g.*, *Lafayette, supra*, 37 Cal.App.4th at 867-68. Indeed, in this very case the California courts addressed the constitutionality of the SLAPP statute, and held it was necessary to protect Knabe's federal constitutional rights. Appendix "E" at p. 17a.

Certiorari is necessary to resolve this conflict. Surely Swanson's due process, free speech, and petition rights under the Fourteenth Amendment are no less significant in California than they would be in New Hampshire, and it would also violate her equal protection rights to say she would be entitled to a jury trial in New Hampshire but not in California under the same statute. This Court has held that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the . . . state courts concerning the meaning of provisions of federal law." *Braxton, supra*, 500 U.S. at 347. *See also* Supreme Court Rules 10(a), (c). The California courts specifically cited this Court's *Buckley v. Valeo* decision to justify the provisions of California's SLAPP statute (Appendix "E" at p. 17a), and so its decision "was based quarely upon its interpretation of federal law," showing that certiorari is appropriate. *Arizona v. Evans, supra*, 131 L.Ed.2d at 43.

Especially given this Court's statement in the *Liberty Lobby* case that a dispositive motion must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition" (477 U.S. at 250 n.5), certiorari should issue to clarify and resolve this legal conflict between different states.

CONCLUSION

As detailed above, certiorari is appropriate to protect a plaintiffs' rights under SLAPP statutes, to resolve the growing conflict between state courts on the constitutionality of SLAPP statutes, and generally to give guidance to state and federal courts in dealing with the

proliferation of SLAPP statutes across the country. But this is a case where certiorari is also important to protect the constitutional rights of an individual, *i.e.*, petitioner Gordana Swanson.

The dismissal of this lawsuit is a miscarriage of justice and a blot on the U.S. judicial system. Based on her information that Knabe was taking bribes and other questionable "contributions" (including donations from the Southern California Buddhist temple and other sources that have plagued the presidential administration), Swanson brought a lawsuit under a constitutionally valid political reform act. Yet just because she was a rival candidate, her claims were summarily dismissed, and she was not allowed to take any discovery (not even the subpoena requested by her pre-lawsuit witness Wooldridge). Instead, the California courts effectively silenced her, and prevented any public review of the questionable financial activities of a potentially dishonest political boss.

If Swanson's information is accurate that Knabe was taking bribes, then Knabe and the California courts have used the SLAPP statute to frustrate the Political Reform Act's goal of preventing "wealthy individuals and organizations [from] spending large amounts to influence legislative and administrative actions." California Govt. Code § 81001(f). By allowing Knabe to avoid discovery on the complaint's bribery allegations, the California courts not only violated Swanson's petition, free speech, jury trial and due process rights, but also dealt a blow to the full and fair exchange of ideas which is the basis of any valid election. *See New York Times, supra*, 376 U.S. at 269 (recognizing an obligation to preserve "the opportunity for free political discussion to the end that government may be responsive to the will of the people").

For each of the above independent reasons, the petition for a writ of certiorari should be granted.

Dated: April 1997.

JAMES B. HICKS
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Attorneys for Petitioner

APPENDIX "A"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 11/2/95
HONORABLE Mary Ann Murphy, Judge

8:30 am BC137038
GORDANA SWANSON
VS
DON KNABE, et al.

NATURE OF PROCEEDINGS:

EX PARTE APPLICATION OF DEFENDANT, DON KNABE, FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
RE: PRELIMINARY INJUNCTION

Matter called for hearing.

Discovery stayed pursuant to C.C.P. 425.16(g) until notice of entry of the order ruling on the motion to strike set for 12/13/95.
Notice waived.

APPENDIX "B"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 12/07/95
HONORABLE Mary Ann Murphy

8:30 a.m. BC137038

GORDANA SWANSON
VS
DON KNABE, et al.

NATURE OF PROCEEDINGS:

EX PARTE APPLICATION OF PLAINTIFF, GORDANA SWANSON, FOR ORDER SHORTENING TIME - MOTION FOR LEAVE TO TAKE DISCOVERY PURSUANT TO C.C.P. SECTION 425.16(g)

Matter called for hearing.

Argued and denied.

Notice by moving party.

APPENDIX "C"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 01/03/96
HONORABLE Mary Ann Murphy, Judge

8:30 a.m. BC137038

GORDANA SWANSON
VS
DON KNABE, et al.

NATURE OF PROCEEDINGS:

MOTION OF PLAINTIFF, GORDANA SWANSON, FOR LEAVE TO TAKE DISCOVERY PURSUANT TO CCP SEC 425.16(g);

Denied for failure to show good cause within the meaning of CCP section 425.16(g).

Counsel for plaintiff to give notice.

APPENDIX "D"

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 01/24/96
HONORABLE Mary Ann Murphy, Judge

8:30 a.m. BC137038

GORDANA SWANSON
VS
DON KNABE, et al.

NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT, DON KNABE, TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT AND FOR ATTORNEY'S FEES AND COSTS

Defendant filed a "complaint to enjoin violations and compel compliance with the Political Reform Act" on October 12, 1995, and after a special motion to strike pursuant to C.C.P. section 425.16 was filed on November 14, 1995, plaintiffs filed a "first amended complaint to enjoin violations and compel compliance with the Political Reform Act and for other relief".

The complaint seeks to enjoin alleged violations of the Act by defendant "in connection with his political campaign", alleging that defendant received illegal secret gifts and payment of money.

Defendant filed the instant special motion to strike plaintiff's first amended complaint pursuant to C.C.P. section 425.16 on December 26, 1995. Under C.C.P. 425.16, defendant bears the initial burden of showing that the action falls within the class of suits subject to the

special motion to strike. Matson v. Dvorak (1995) 40 Cal.App.4th 539, 548, Dixon v. Superior Court (1994) 30 Cal.App.4th 733, 742; Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, 819. The defendant need not first establish that his actions are constitutionally protected under the first amendment as a matter of law. Wilcox, supra, 27 Cal.App.4th at 820. The statute requires the defendant to make a prima showing that plaintiff's suit arises from any act of defendant in furtherance of his right to petition or free speech under the United States or California constitution in connection with a public issue. Id. If plaintiff's suit arises out of the defendant's constitutionally protected conduct, plaintiff should be held to satisfy the statute's requirement. Wilcox, supra, 27 Cal.App.4th at 821.

This case has many elements of SLAPP suit [*sic*]. Pla'ntiff and defendant are opposing candidates for a seat on the Los Angeles County Board of Supervisors, representing the Fourth District. The primary election will be held on March 26, 1996. Defendant has solicited and raised funds for his campaign which is protected under the First Amendment. These acts are in furtherance of rights protected by the First Amendment. Three of ten reported SLAPP cases in this state arise from political campaigns. Matson v. Dvorak (1995) 40 Cal.App.4th 539; Evans v. Unkow (1995) 38 Cal.App.4th 1490; Robertson v. Rodriguez (1995) 36 Cal.App.4th 347.

The complaint alleges that defendant used his position to receive bribes, gifts and cash payments, which were diverted to his personal use and illegally raised campaign contributions. There is a real potential for retaliatory minded political contestants to artfully plead around C.C.P. section 425.16 and embark on expensive discovery, thereby diverting the opposing candidate's time and financial resources during a political race.

Defendant has sustained the burden of proof. Plaintiff's suit arises from acts of defendants in furtherance of his first amendment right.

The burden shifts to demonstrate a probability he will prevail on his claim. Matson v. Dvorak (1995) 40 Cal.App.4th 539, 548. Plaintiff has failed to meet that burden.

Plaintiff's opposition is two-fold. First, plaintiff relies on the Smith declaration, which was not attached, and was not filed until the morning of the hearing on defendant's motion, January 24, 1996. That declaration consists of hearsay and is without personal knowledge on part of Mr. Smith. The attachment to the declaration is hearsay, and consists primarily of statements of Mr. Wooldridge allegedly overheard, which would involve two layers of hearsay. The attachment states, among other things "the point is to dirty up [the defendant]". "We obviously can't prove much of this . . . ." Such a declaration is inadequate to show a probability that plaintiff will prevail on the claim. Evans v. Unkow (1995) 38 Cal.App.4th 1490, 1497.

Second, plaintiff contends that her requests to conduct discovery should have been granted. In Ludwig v. Superior Court (1995) 37 Cal.App.4th 8, 16, the court held that the legislative purpose of C.C.P. section 425.16 is best served by an interpretation which would require a plaintiff marshal facts sufficient to show the viability of the action before filing a SLAPP suit. C.C.P. section 425.16(g) provides that upon the filing of special motion to strike, discovery is stayed unless good cause is shown for special discovery.

Here, plaintiff claimed that Mr. Wooldridge refused to give a written statement. Instead of requesting precisely tailored discovery, in November 1995 plaintiff noticed, without first obtaining obtaining [sic] leave of court as required by C.C.P. section 425.16(g), a number of depositions, including that of defendant and his three banks, each of which requested massive document production. Defendant's request for a stay pursuant to C.C.P. section 425.16(g) was granted on November 27, 1995, based on plaintiff's failure to show good cause for the discovery.

On December 12, 1995 plaintiff requested leave to take discovery depositions of Mr. Wooldridge and three banks. The document requests served with the bank deposition notices requested all bank records of defendant, his wife, his campaign contributors, and many other persons and entities. The document request served with the Wooldridge deposition notice was on a grand scale as well. The ex parte application was denied for failure to show good cause for the specified discovery on December 7, 1995.

These discovery requests in no way constituted "a limited opportunity to conduct discovery." Wilcox, supra, 27 Cal.App.4th 809, 823. They did not constitute fishing expeditions, rather they were attempts to dredge the lake.

Defendant's special motion to strike is granted and this action is dismissed.

Plaintiff to file response to defendant's motion for sanctions on 2/7/96. Defense to file reply on 2/14/96. Hearing on 3/6/96 at 8:30 AM in this department.

Counsel for plaintiff to give notice.

APPENDIX "E"

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

GORDANA SWANSON,
Plaintiff and Appellant,
v.
DON KNABE,
Defendant and Respondent.
B099985
(Super. Ct. No. BC 137038)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Ann Murphy, Judge. Affirmed.

Donovan Leisure Newton & Irvine, James B. Hicks, Kathy A. Jorrie and Christie Gaumer, for Plaintiff and Appellant.

Reed & Davidson, Dana W. Reed and Bradley W. Hertz, for Defendant and Respondent.

This appeal arises out of the election for the 4th District seat on the Los Angeles County Board of Supervisors, and presents an issue regarding the scope of the anti-SLAPP statute, Code of Civil Procedure section 425.16.[8/]

Candidate Gordana Swanson (Swanson) filed a complaint for violations of the Political Reform Act against her opponent Don Knabe (Knabe), alleging he received illegal gifts and payments of money in

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[8/] Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

connection with the campaign. The superior court granted Knabe's special motion to strike the action as a SLAPP (strategic lawsuit against public participation) suit, and Swanson appealed.[9/]

We find the constitutional right of free speech includes a political candidate's fund-raising activities and constitutes a legitimate issue of public concern protected by the anti-SLAPP law. We further find that Swanson was unable to establish either the probability of prevailing on her claim, or the statutory prerequisites for conducting discovery. Accordingly, we affirm.[10/]

FACTUAL AND PROCEDURAL BACKGROUND

Swanson and Knabe are rival candidates for the 4th District seat on the Los Angeles County Board of Supervisors. They received the most votes in the March 26, 1996 primary election, and will vie for the supervisoral seat in the November 5, 1996 general election.

On October 12, 1995, during the primary campaign, Swanson filed a complaint seeking to enjoin Knabe from alleged violations of the

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9/ A SLAPP suit has been characterized as "one brought to intimidate and for purely political purposes." (*Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1769. "In very general terms it is a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights. [Citation.]" *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2.)

"A claim arising from a person's exercise of the right of free speech in connection with a public issue is subject to a special motion to strike, unless the trial court determines '. . . the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (Code Civ. Proc., §425.16, subd. (b).)" (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 352, fn. 1)

10/ The trial court also awarded Knabe his fees and costs. That matter is the subject of a separate appeal (B101986) and, because the record has not yet been perfected, will not be considered at this time.

Political Reform Act. (Gov.Code, §8100 et seq.)[11]/ In her first amended complaint, Swanson alleged Knabe violated Government Code section 87100 by using "his official position to influence governmental decisions in which he knows or has reason to know he has a financial interest."[12]/

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[11]/ "The Political Reform Act of 1974 . . . was an initiative measure intended to correct election abuses in California. [Citations.] The drafters designed the Act to provide California voters a greater degree of governmental supervision over the political process. [Citation.]" (*California Common Cause v. Fair Political Practices Com.* (1990) 221 Cal.App.3d 647, 649.) The Political Reform Act, as it relates to our case, requires public officials to make periodic disclosures of their financial interests. (*Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562, 568.) "The disclosure schemes . . . seek appropriate information from designated state and local officials about the sources and general magnitude of their financial interests which may give rise to conflicts of interests." (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 897.)

[12]/ Government Code section 87100 provides that "[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

We also note that the first amended complaint was filed pursuant to Government Code section 91003, 91004, and 91005.

Section 91003 provides, in relevant part, that "[a]ny person residing in the jurisdiction may sue for injunctive relief to enjoin violations or to compel compliance with the provisions of this title."

Section 91004 provides that "[a]ny person who intentionally or negligently violates any of the reporting requirements of this act shall be liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount not more than the amount or value not properly reported."

Swanson further alleged, on information and belief, "that Knabe has voted on and continues to influence boards and commissions such as the Rapid Transit District/Metropolitan Transportation Authority, using that position to receive bribes and gifts and cash payments, including cash payments through his wife's company of at least $25,000 from a lobbying firm controlled by a lobbyist named Harvey Englander, which cash payments Knabe has diverted to his personal use."

Knabe moved to strike Swanson's complaint as a SLAPP suit pursuant to section 425.16. Knabe contended Swanson could not show a probability of prevailing on the complaint and his campaign-related actions, including fund-raising, constituted protected First Amendment activity.

In opposition, Swanson argued her lawsuit was not a SLAPP action because the allegations in the complaint were directed only at stopping Knabe from taking bribes. This activity, Swanson argued, was in violation of the Political Reform Act conflict of interest provisions, and was not constitutionally protected. Swanson further argued Knabe's motion should be denied because she had been precluded from conducting discovery to oppose the motion.[13]/

In support of the opposition, though filed with a subsequent discovery motion, Swanson submitted the declaration of her campaign consultant Ron Smith (Smith), who stated, in relevant part: "On several

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Section 91005 provides, in relevant part, that "(a) Any person who makes or receives a contribution, gift or expenditure in violation of Section 84300, 84304, 86202, 86203, or 86204 is liable in a civil action . . . . [¶] (b) Any . . . public official specified in Section 87200, . . . , who realizes an economic benefit as a result of a violation of Section 87100 . . . is liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount up to three times the value of the benefit."

13/ Discovery issues will be considered in a subsequent portion of this opinion.

occasions, including on or about May 5, 1995, I met with Dan Wooldridge, the former partner of defendant Don Knabe's campaign consultant Harvey Englander. During these meetings, Mr. Wooldridge told me that Mr. Englander has funneled large sums of money, probably over $25,000 and perhaps as much as $100,000, to Don Knabe, by means of phone payments to a dummy company called 'JDK Associates' or 'J.D. Knabe & Associates' controlled by Mr. Knabe's wife Julie Knabe. Mr. Wooldridge also told me that he had written evidence to back up his statements, and he briefly showed me a copy of a ledger page showing payments to Mr. Knabe's company. I have tried to obtain a written statement from Mr. Wooldridge to this effect, and have also tried to get copies of his supporting documents, but he told me that he would be willing to respond only to a subpoena. . . ."

In response, Knabe filed the declaration of Dan Wooldridge (Wooldridge) who stated, in pertinent part: "Mr. Smith and I did have some conversations in mid-1995. I did not, however, make any of the statements that Mr. Smith attributes to me in his Declarations, and I have no information that would support any of those alleged statements. [¶] Specifically, I have no information that Mr. Englander ever funneled money to Don Knabe, directly or indirectly; that there were any payments, 'phony' or otherwise, to any 'dummy' company controlled by Mr. Knabe or his wife, in any name; or that any bribe was ever paid to Mr. Knabe from any source whatsoever. [¶] Additionally, I did not show Mr. Smith any document that was, or could be construed as, a 'ledger' page, or any document showing any payment from Mr. Englander or his company to Mr. Knabe or any person or entity connected to Mr. Knabe. Further, I do not know of the existence of any document showing any such payment."

In reply, Swanson submitted Smith's supplemental declaration, which contained an attached memorandum from Wooldridge to Smith, dated August 17, 1995. Smith stated the memorandum would support his prior declaration and detail improper payments from Harvey Englander to Knabe. In the attached memorandum Wooldridge stated, in relevant part: "Based upon a review of our past conversations and further discussions with my attorney -- it appears that my comments to

you about my belief that Harvey Englander paid Don Knabe are pretty much my personal conclusions. [¶] The 'facts' are based upon my hearing or overhearing conversations and seeing the check listings of company 'payables' that includes Knabe's name. Those fragmentary bits of information are not 'smoking guns' nor would any testimony given by me, provide sufficient information or proof to resemble one let alone led [*sic*] to a conviction. [¶] Knowing full well, Harvey [Englander]'s bag of tricks, I have great reluctance (personally or for Ms. Swanson) to [lead] with our chins given our limited information."

In the memo, Wooldridge described the system by which Knabe, as (Deane) Dana's deputy and in charge of his re-election, hired, or had a role in hiring, Harvey Englander's campaign firm. Englander, Wooldridge explained, paid commissions or finder's fees to persons who delivered campaigns to him, 15 to 25 percent of his commissions. Therefore, Wooldridge concluded, "[i]f Knabe was the finder . . . the money Harvey paid to Don was a commission or payoff for hiring him. It's commonly called a kickback or an under the table payment for services rendered. The service Don Knabe performed for Harvey was to deliver the campaign." However, Wooldridge explained, "I cannot specifically recall anything that would [lead] me to believe that Don was getting a 'piece of Harvey's over-billings, but it seems to me that the size of the [checks] going out to Knabe were of such a size and regularity that Harvey was always pained . . . . [¶] I also believe that Don got a piece of Harvey's winner bonus. I'm not positive . . . ."

In the memo, Wooldridge then provided Smith further information about Harvey Englander and described what appeared to be campaign tactics: "A Few Basic Questions about how to best proceed with this: [¶] The point is to dirty up Don. Hitting Harvey is secondary since weakening Don is the point. Don will be quick to say he reported everything . . . . [¶] We also know that Don got checks from Harvey. How can we prove it? . . . . [¶] Scenario A [¶] We publically [*sic*] attack Knabe via letter to DA or ? about his failure to disclose his sources of income. We suggest that this is a pattern of his behavior. . . . Ask for the public's help in getting to bottom of this. [¶] Don responds somehow . . . . DA moves slowly . . . [¶] Alternative B [¶]

Letter or meeting with Deane Dana laying the cards on table. . . . We're [*sic*] learned in our research about Don that he's failed to disclose his sources of income. . . ."

Finally, at the conclusion of the memorandum, Wooldridge stated: "We obviously can't prove much of this, but the implications of these comments would tend to [validate] what Deanne (and his wife) already think about Harvey."

On January 24, 1996, the trial court granted Knabe's motion to strike and dismissed Swanson's complaint.[14]/ In a detailed eight-page

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[14]/ The trial court stated, in relevant part: "This case has [many] elements of SLAPP suit. Plaintiff and defendant are opposing candidates for a seat on the Los Angeles County Board of Supervisors, representing the Fourth District. The primary election will be held on March 26, 1996. Defendant has solicited and raised funds for his campaign which is protected under the First Amendment. . . . Three of ten reported SLAPP cases in this state arise from political campaigns. [Citations.] [¶] The complaint alleges that defendant used his position to receive bribes, gifts and cash payments, which were diverted to his personal use and illegally raised campaign contributions. There is a real potential for retaliatory minded political contestants to artfully plead around C.C.P. section 425.16 and embark on expensive discovery, thereby diverting the opposing candidate's time and financial resources during a political race. [¶] . . . [P]laintiff relies on the Smith declaration . . . . That declaration consists of hearsay and is without any personal knowledge on party of Mr. Smith. The attachment to the declaration [Wooldridge memorandum] is hearsay, and consists primarily of statements of Mr. Woolridge [*sic*] allegedly overheard, which would involve two layers of hearsay. . . . Such a declaration is inadequate to show a probability that plaintiff will prevail on the claim."

As to Swanson's argument she was denied the opportunity to conduct discovery, the trial court found she had failed to show good cause and the requested "discovery requests in no way constituted 'a

minute order, the trial court determined that Swanson's action constituted a SLAPP suit, Knabe's fund-raising activities were protected by the First Amendment, and that Smith's hearsay declaration, and the attached Wooldridge memorandum, were inadequate to show a probability Swanson would prevail on her claim. Furthermore, the trial court found Swanson provided neither good cause to take limited discovery nor specifically tailored discovery requests. The trial court entered a stipulated judgment of dismissal.

On February 6, 1996, Swanson filed a notice of appeal.

CONTENTIONS

Swanson contends her claim of Knabe's Political Reform Act violations is not subject to section 425.16, and she was denied the right to conduct discovery.

DISCUSSION

1. *The Trial Court Correctly Applied Section 425.16 to Swanson's Lawsuit.*

The anti-SLAPP statute, section 425.16, protects individuals exercising their constitutional rights of free speech and petition against meritless lawsuits. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 644.) The statute "is a procedural screening mechanism for determining whether a plaintiff can demonstrate sufficient facts to establish a prima facie case to permit the matter to go to a trier of fact. [Citation.]" (*Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 356.) "SLAPP suits have been defined as '. . . "civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so.' [Citations.] They are brought, not to vindicate a legal right, but rather to interfere with the defendant's ability to pursue his or her interests. Characteristically,

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limited opportunity to conduct discovery.' [Citation.] They did not constitute fishing expeditions, rather they were attempts to dredge the lake."

the SLAPP suits lacks merit; it will achieve its objective if it depletes defendant's resources or energy. The aim is not to win the lawsuit but to detract the defendant from his or her objective, which is adverse to the plaintiff. [Citation.]" (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at p. 645.)

Swanson contends her action against Knabe is neither a SLAPP suit nor subject to section 425.16, because the alleged conduct of taking bribes is not a constitutionally protected activity. We disagree.

In determining whether section 425.16 can be applied to Swanson's action, we first "ascertain the intent of the Legislature by looking to the words of the statute and giving them their ordinary meaning. [Citation.] When statutory language is clear and unambiguous, there is no need for interpretation, and we must apply the statute as written. [Citation.]" (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 547).

Section 425.16, subdivision (b) provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Section 425.16, subdivision (e) provides that "[a]s used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

The statutory language is clear. The plaintiff's action is initially tested under section 425.16, subdivision (b). (*Wilcox v. Superior Court, supra*, 27 Cal.App.4th at p. 820.) This test only requires that

the defendant establish the plaintiff's cause of action or complaint "arises from" the defendant's valid exercise of free speech or petition rights concerning a matter of public interest. (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at pp. 647-649; *Wilcox v. Superior Court, supra*, 27 Cal.App.4th at 820.) Contrary to Swanson's assertion, the statute does not limit its application to only constitutionally protected activity. (*Id.* at p. 822.) The Legislature did not intend "that to invoke the special motion to strike the defendant must first establish its actions are constitutionally protected under the First Amendment as a matter of law. If this were so the second clause of subdivision (b) of section 425.16 would be superfluous because by definition the plaintiff could not prevail on its claim." (*Id.* at pp. 820, 822.)

In our case, Swanson initiated a lawsuit against Knabe during a primary campaign. Her allegations affect the exercise of Knabe's free speech rights as a public official and as a candidate. They were made in connection with his campaign and fundraising efforts, both which are First Amendment activities. (See *Buckley v. Valeo* (1976) 424 U.S. 1, 14.)

" 'Public discussion about the qualifications of those who hold or who wish to hold positions of public trust presents the strongest possible cause for applications of the safeguards afforded by the First Amendment.' [Citation.] It is axiomatic that the qualifications of a declared candidate for public office is a public issue." (*Matson v. Dvorak, supra*, 40 Cal.App.4th at p. 548.) Knabe's fundraising efforts raise a question of public interest. The issue of whether a candidate for public office has received illegal gifts or accepted bribes is a legitimate issue of public concern. (*Id.* at p. 550.) " 'In choosing those who are to govern them, the public must, of course, be afforded the opportunity of learning about any facet of a candidate's life that may relate to his fitness for office.' " (*Ibid.*) Accordingly, Knabe's political activities are entitled to the benefits of section 425.16. (See *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950.)

The trial court correctly determined that Knabe satisfied the threshold requirement that Swanson's action fell within the ambit of the

anti-SLAPP statute. We now consider whether Swanson established the probability that she would prevail on the merits of the complaint.

2. *Swanson Failed to Establish by Admissible Evidence the Probability She Would Prevail on Her Claim.*

"Once the party moving to strike the complaint makes that threshold showing, the burden shifts to the responding plaintiff to establish a probability of prevailing at trial." (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 [54 Cal.Rptr.2d 830, 835].) "To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. [Citation.] Whether he has done so is a question of law, which we determine de novo. [Citations.]" (*Matson v. Dvorak, supra,* 40 Cal.App.4th at p. 548; see also *Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at p. 652.) To support a prima facie showing, a plaintiff must produce competent admissible evidence within the personal knowledge of a declarant. (*Church of Scientology v. Wollersheim, supra,* 42 Cal.App.4th at p. 654; *Wilcox v. Superior Court, supra*, 27 Cal.App.4th at p. 830.) "Averments on information and belief are insufficient." (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at p. 654; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497-1498.)

To determine whether Swanson established a probability she would prevail, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§425.16, subd. (b).)

Swanson's entire action rests on the statements Smith attributed to Wooldridge. A review of Swanson's amended complaint shows an absence of any admissible evidence to support her allegations of Political Reform Act violations. First, the allegations in her amended complaint are not admissible because, aside from the fact the complaint is unverified, the statements are made on information and belief. "Generally, a party cannot simply rely on the allegations in its own

pleadings, even if verified, to make the evidentiary showing required in the summary judgment context or similar motions . . . . [Citation.] The same rule applies to motions under section 425.16. Here, like motions under . . . 437c, the pleadings merely frame the issues to be decided. Similarly, an averment on information and belief is inadmissible at trial, and thus cannot show a probability of prevailing on the claim. [Citation.]" (*Church of Scientology v. Wollersheim, supra*, 42 Cal.App.4th at p. 656.)

Second, the amended complaint is based on Smith's declaration and Wooldridge's memorandum. Both documents contain inadmissible hearsay and multiple hearsay statements. Smith's declaration relays statements of Wooldridge to him regarding Englander and Knabe's activities. Smith has no personal knowledge of Englander and Knabe's activities. The Wooldridge memorandum, an attachment to Smith's declaration, consists primarily of information Wooldridge overheard and then told to Smith, which constitutes multiple hearsay. Furthermore, Wooldridge conceded his statements to Smith about Knabe's activities were "pretty much my personal conclusions" and that "[w]e obviously can't prove much of this." The declaration, and the memorandum on which it was based, are both inadequate, and fail to rise to the level of competent admissible evidence.

On this evidence, the trial court properly determined Swanson failed to show a probability she would prevail in her lawsuit.

3. *Swanson's Requests for Discovery Were Properly Denied for Failure to Meet the Statutory Requirements of Section 425.16, Subdivision (g).*

Under section 425.16, subdivision (g), "[a]ll discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. . . . The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, *on noticed motion* and *for good cause* shown, may order that *specified discovery* be conducted notwithstanding this subdivision." (Italics added.)

Swanson contends the denial of her right to take discovery violated

her due process rights because she was unable to adequately defend against the motion to strike. We disagree. Furthermore, Swanson failed to provide any argument and legal authority to support her constitutional attack on the statute.

The record reflects that on November 14, 1995, one month after Swanson filed her initial complaint, Knabe served and filed a motion to dismiss. On the same day, Swanson served subpoenas and notices for eight depositions and documents productions. Consumer records were sought from Don Knabe, Julie Knabe (wife), Harvey Englander, Dan Wooldridge & Pierson, Englander & Wooldridge & Pierson, AJD Direct, Englander Group, Profit Insurance, Profitt, J.D. Knabe & Associates, and JDK Associates. Additionally, deposition notices were served on Far East Bank, Orange National Bank, California State Bank, Don Knabe, Harvey Englander, Julie Knabe, Dan Wooldridge, and Jerry Pierson. Each consumer records notice to the banks contained a 12-category document request regarding a 22-paragraph list of items, to wit, bank accounts, checks, drafts, and payments. Each deposition notice contained a 21-category document request, with numerous references to a list of 156 campaign contributors. Contrary to Swanson's assertions, the requests, overbroad and going back to January 1, 1991, demanded "any and all documents" related to an extensive list of, inter alia, communications, bank accounts, campaign contribution records, checks and payments.[15/]

[15/] The document requests for all the individual deponents were identical. Swanson requested, in relevant part: "1. Any and all documents which constitute, refer or relate to any communications between Knabe and JDK. [¶] 2. Any and all documents which constitute, refer or relate to any communications between Knabe and Englander . . . . [¶] 3. Any and all documents which constitute, refer or relate to any communications between Knabe and any Contributor. [Attached to the document request was a list of 156 campaign contributors, including law firms.] [¶] 4. Any and all documents which constitute, refer or relate to any communications between JDK and

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Englander . . . . [¶] 5. Any and all documents which constitute, refer or relate to any communications between JDK and any Contributor. [¶] 6. Any and all documents which constitute, refer or relate to any communications between Englander and any Contributor. [¶] . . . . [¶] 8. Any and all documents which constitute, refer or relate to any payments received by JDK from any Contributor, including without limitations checks, invoices, and financial records. [¶] . . . . [¶] 12. Any and all documents which constitute, refer or relate to any telephone call made from any telephone owned or operated by the County of Los Angeles to JDK. [¶] . . . . [¶] 15. Any and all documents which constitute, refer or relate to any visit to any golf course by Knabe in the presence of any Contributor. [¶] . . . . [¶] 17. Any and all documents which constitute, refer or relate to any matter on which Knabe voted while he was voting on the board of the Southern California Rapid Transit District, which related to any Contributor. [¶] . . . . [¶] 19. Any and all documents which constitute, refer or relate to any matter on which Knabe voted while he was on the board of the Metropolitan Transit Authority, which related to any Contributor. [¶] . . . . [¶] 21. Any and all documents which constitute, refer or relate to any person who has been a client of Englander at any time."

Swanson requested identical documents from each bank. In 12 document requests, Swanson requested "any and all documents" listed in 22 paragraphs of a description of matters of examination in attached Exhibit "A". The items for examination included, inter alia, bank accounts in the names of, and also bank accounts under the control of, Harvey Englander, Campaign Management, Inc., CMI, Englander, Wooldridge & Pierson, Profit Insurance, AJD Direct, and PROFITT, and more. Furthermore, Swanson listed, in relevant part: "20. Payments, checks or drafts drawn on any of the bank accounts described above in paragraphs 1 through 18, inclusive, and payable to Don Knabe. [¶] 21. Payments, checks or drafts drawn on any of the bank accounts described above in paragraphs 1 through 18, inclusive, and payable to J.D. Knabe & Associates. [¶] 22. Payments, checks or

After Swanson refused to abide by the section 425.16, subdivision (g) stay, Knabe obtained a court-ordered stay of all discovery. The day Swanson filed her amended complaint, she also filed an opposition to Knabe's motion to strike the original complaint, and a cross-motion for leave to take discovery, which included Smith's declaration. The next day, Swanson filed an ex parte application for an order shortening time to hear the discovery request. On that same day, and over Swanson's objections, the trial court heard Swanson's discovery motion on the merits. The motion was denied.

Two weeks later, Swanson filed a motion for leave to take four depositions -- Dan Wooldridge, California State Bank, Far East Bank, and Orange Bank. Swanson attached Smith's declaration (previously discussed), allegedly to show good cause for the discovery. Smith stated, in relevant part: "All of the discovery already noticed by Swanson is in fact necessary to her opposition to Knabe's SLAPP motion, should the Court require her to prove a probability of success on the merits. . . At the very least, the court should allow Swanson to depose Mr. Englander, Mr. Englander's former partner Dan Wooldridge and the three banks which formerly held Mr. Englander's bank accounts, and which were most likely conduits of the bribes." Swanson also included the declaration of her attorney who described the good cause for discovery by citing to allegations in the complaint.

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drafts drawn on any of the bank accounts described above in paragraphs 1 through 18, inclusive, and payable to and its JDK Associates."

Swanson then requested from the Banks, documents related to those categories of described items, in relevant part: "1 Any and all documents which constitute, refer or relate to any checks referenced in Paragraph 19 of Exhibit A, above. [¶] 2. Any and all documents which constitute, refer or relate to any drafts referenced in Paragraph 19 of Exhibit A, above. [¶] . . . . [¶] 8. Any and all documents which constitute, refer or relate to any drafts referenced in Paragraph 21 of Exhibit 'A', above."

Furthermore, Swanson contended, good cause was based on the fact her lawsuit was not a SLAPP action. Swanson, however, did not limit the scope of the document requests. In fact, the second document request (attached to the four depositions) was identical to the first document request. We note that the internal word processing code on both sets of documents is the same. Swanson's motion was "[d]enied for failure to show good cause within the meaning of CCP section 425.16(g)."

Swanson has continually argued the good cause required for discovery was based on the premise (1) her action did not constitute a SLAPP suit, (2) the motion to strike was invalid on its face because taking bribes is not a constitutionally protected activity, and (3) the discovery was necessary to oppose Knabe's motion to strike. This reasons do not constitute sufficient good cause.

First, as previously discussed, Swanson's restrictive interpretation of section 425.16 is legally incorrect, and her action fell within the ambit of the anti-SLAPP statute. Second, Swanson relied on the Smith declaration, and the allegations in her complaint, to justify the need for discovery. These documents, however, were inadmissible as evidence to show a probability of success on her claim and could not establish any cause, let alone good cause, for discovery.

Third, Swanson could have conducted discovery if she had shown good cause and focused her requests to those that would enable her to get over the statutory procedural hurdle. At oral argument, Swanson's counsel argued, for the first time, that the discovery requests were limited to obtaining information about money paid to Knabe by persons appearing before the Metropolitan Transit Authority, and this related to the allegations in the amended complaint. However, a review of the record establishes the document requests went well behind the now alleged focus of the discovery. Swanson was not prevented from conducting discovery. (See *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App. 4th 855, 867-868.) Swanson just refused to abide by the statutory limitations put on her requests, because she counted on the trial court finding Knabe's motion defective. That did not happen. Swanson mistakenly based her complaint on hearsay

information and then attempted to verify the "facts" by conducting an extensive and unlimited search of Knabe's financial records, banks and associates. An examination of the requested discovery leads us to conclude that those requests were neither focused nor limited. Such an extended demand for information should not have been necessary at this state of the litigation. Swanson should be aware that under section 425.16, "a plaintiff [is required] to marshal facts sufficient to show the viability of the action *before* filing a SLAPP suit." (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 16.)

The trial court corrected determined Swanson failed to satisfy the statutory requirements under section 425.16, subdivision (g), and properly denied her motion.

CONCLUSION

We conclude that Swanson failed to meet her appellate burden of showing error, and that the trial court correctly granted Knabe's section 425.16 motion to dismiss.

DISPOSITION

The judgment of dismissal is affirmed. Knabe is awarded costs on appeal.

KITCHING, J.

We concur:

KLEIN, P.J.

CROSKEY, J.

APPENDIX "F"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

GORDANA SWANSON, Plaintiff and Appellant, v. DON KNABE, Defendant and Respondent.	B099985 (Super. Ct. No. BC137038) ORDER MODIFYING OPINION AND DENYING REHEARING NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on October 22, 1996, be modified in the following particulars:

1. On page 15, line 4 of the third full paragraph, the word "limited" is changed to "directed, in part," so the entire sentence now reads: At oral argument, Swanson's counsel argued, for the first time, that the discovery requests were directed, in part, to obtaining information about money paid to Knabe by persons appearing before the Metropolitan Transmit Authority, and this related to the allegations in the amended complaint.

2. On page 15, line 7 of the third full paragraph, the words "the now" are changed to "even that" so the sentence now reads: However, a review of the record establishes the document requests went well behind even that alleged focus of the discovery.

3. This order does not effect a change in the judgment.

Appellant's petition for rehearing is denied.

APPENDIX "G"

S057611

IN THE SUPREME COURT OF CALIFORNIA

GORDANA SWANSON, Appellant

v.

DON KNABE, Respondent

Petition for review DENIED.

/s/ George
Chief Justice

APPENDIX "H'

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

GORDANA SWANSON, an individual, Plaintiff,	) Case No. BC 137 038
v.	) PLAINTIFF'S OPPOSITION TO STRIKE; CROSS-MOTION FOR LEAVE TO TAKE DISCOVERY
DON KNABE, an individual; and DOES 1 Through 40, Defendants.	) PURSUANT TO CCP §425.16(g); DECLARATION OF RON SMITH

* * *

II. EVEN IF KNABE COULD SHOW THAT HIS ACT OF TAKING BRIBES WAS CONSTITUTIONALLY PROTECTED, SWANSON SHOULD BE ALLOWED TO TAKE DISCOVERY UNDER CCP §425.16(g)

As shown in the previous section, Swanson's burden to prove a probability of success on the merits only arises if Knabe somehow makes a prima face showing under the SLAPP statute (27 Cal.App.4th at 820) -- which Knabe cannot do. Moreover, Swanson has standing to bring this lawsuit, since the Political Reform Act creates a private right of action under Government Code §§91003-91005 for violation of Government Code §87100 prohibiting bribes.

Yet Knabe insists that Swanson should not be allowed to pursue her claims at all, or to take any discovery whatsoever, unless she first proves by "admissible evidence" facts to support her complaint's bribery allegations. The problem is that neither Swanson nor anybody else on her campaign staff gave Knabe the bribes, and it would be unfair to

force her to an evidentiary standard of proving bribes which no plaintiff could meet under the Political Reform Act. She is informed and believes that the bribes actually took place (*see* Smith Decl. ¶2, but Knabe will undoubtedly object to this evidence as hearsay. Yet the eyewitnesses who could expose Knabe's illegal conduct have declined to testify absent a subpoena. *Id.*

Nor has Swanson been given an opportunity to exercise her "limited opportunity to conduct discovery" under CCP §425.16(g). *See Wilcox, supra*, 27 Cal.App.4th at 823. The Discovery Act prohibits discovery immediately after a lawsuit is filed and a defendant is served (CCP §2025(b)(2)), and although Swanson promptly served written discovery requests once she was able to do so, Knabe immediately responded with his motion to strike and its automatic stay of discovery. Knabe has thus very carefully prevented Swanson from taking any discovery at all.

The Court of Appeal has noted that such an outright prevention of discovery may be subject to a constitutional challenge as "violat[ing plaintiff's] right to due process by requiring a plaintiff to establish probability of success without the opportunity to conduct discovery." *Dixon, supra*, 20 Cal.App.4th at 746. Although *Dixon* denied the plaintiff's request for discovery in that case because his complaint failed as a matter of law (*id.*), under the analogous summary judgment statute, a continuance to allow discovery "must" be granted where "essential evidence 'may exist but cannot, for reasons stated, then be presented.' " Weil & Brown, *Civil Procedure Before Trial* ¶10:207, at p. 10-57 (1995). Since, like a SLAPP motion, "[s]ummary judgment is a drastic procedure that should be used cautiously so that it does not become a substitute for trial," the law "mandates a continuance of [the] hearing upon a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion." *Nazar v. Rodoffer*, 184 Cal.App.3d 546, 556-57 (1986) (reversing summary judgment which was granted without allowing plaintiff to take discovery).

And as shown by the attached Smith Declaration, all of the discovery already noticed by Swanson is in fact necessary to her opposition to Knabe's SLAPP motion, should the Court require her to prove a probability of success on the merits. Most of the bribes at issue were funneled to Knabe by payments to his campaign manager Harvey Englander who then passed them on to a dummy business called "JDK Associates" or "JD Knabe & Associates" controlled by Knabe's wife. Smith Decl. ¶2; *see* First Amended Complaint at ¶8. And in fact the depositions which have been noticed by Swanson are for Mr. Englander; Mr. Englander's former partners Dan Wooldridge and Jerry Pierson; three banks which formerly held Mr. Englander's bank accounts, and which were the likely conduits of the bribes; Julie Knabe; and Knabe himself. Smith Decl. ¶3.

Under these circumstances, a continuance should be granted, and leave to take discovery allowed under CCP §425.16(g), so that Swanson can take these necessary depositions "to obtain facts essential to justify opposition to the motion." *Nazar, supra*, 184 Cal.App.3d at 556-57.[16/]

Date: December 6, 1995.

JAMES B. HICKS
KATHY A. JORRIE
CHRISTIE GAUMER
ANDREWS & KURTH L.L.P.

By: /s/ James B. Hicks
James B. Hicks
Attorneys for Plaintiff
GORDANA SWANSON

[16/] Swanson has already given ex parte notice on her ex parte application for an order shortening time on her motion to be allowed to take discovery under CCP §425.16(g), which ex parte application is set to be heard on December 7, 1995.

APPENDIX "I'

2d Civil No. B 099 985

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION THREE

GORDANA SWANSON,
Plaintiff and Appellant,
vs.
DON KNABE,
Defendant and Respondent.

APPELLANT'S PETITION FOR REHEARING;
DECLARATION OF JAMES B. HICKS

* * *

Point II: The Opinion Also Violates Swanson's Due Process Rights By Denying Her Any Discovery Whatsoever

As Swanson has previously argued, her due process rights were violated by the trial court's absolute refusal to let her take any discovery whatsoever. She admitted that her allegations about Knabe's bribes were based on information an belief, and the undisputed evidence below indicated that the third-party witness who first brought Knabe's bribes to her attention refused to provide his documents or give a written statement except in response to a subpoena. *E.g.*, Smith Decl. ¶2 (AA75).

The Opinion holds that the trial court properly denied Swanson's discovery which supposedly "demanded 'any and all documents' related to an extensive list of, inter alia, communications, bank accounts, campaign contribution records, checks and payments." Opinion at p. 13. Unfortunately, the Opinion focuses on Swanson's original discovery requests, which were served before Knabe's SLAPP motion was filed. Although Swanson subsequently brought two motions for leave to take more limited discovery, the Opinion dismisses her subsequent discovery requests as "identical to the first document request." *Id.* at p. 15.

But Swanson's discovery which she sought leave to take did not focus on "an extensive list of, inter alia, communications, bank accounts, campaign contribution records, checks and payments." Most of her requested deposition notices were directed toward three banks, from whom she merely requested "checks", "drafts," and "payments" drawn on Knabe's campaign manager Harvey Englander's or his companies' bank accounts, and made payable to Knabe, his wife, or the two "dummy compan[ies]" named by third-party witness Dan Wooldridge (AA98-99, 106-07, 114-15). (Englander was fingered by Mr. Wooldridge as the person who "funneled large sums of money ... to Don Knabe." Smith Decl. ¶2 (AA93)).

Swanson also sought leave to take the deposition of Mr. Wooldridge himself. Although her document request to Mr. Wooldridge did seek the types of documents listed in the Opinion (*see* AA120-22), Mr. Wooldridge had stated that he would produce his incriminating documents on Knabe only in response to a subpoena (AA75), and it would have been risky to seek leave to serve a limited subpoena on Mr. Wooldridge which might not reach all of the relevant documents in his possession. In any event, since Mr. Wooldridge had stated his willingness to respond to the subpoena (*id*), it was not oppressive to serve a more extensive document request upon him, especially since it relates to the matters identified in his memo to Ron Smith (AA241-42).

Under these circumstances, Swanson clearly tried to limit her discovery to comply with the SLAPP statute -- and to the extent that the trial court found the Wooldridge document request was overbroad, it should still have allowed the bank document requests to go forward. Indeed, it is hard to see how the bank document requests could possibly be more specifically drafted, since they seek precisely the payment "funneling" information identified by Mr. Wooldridge.

The Opinion thus fails to "authoriz[e] reasonable and limited discovery timely petitioned for by a plaintiff":

> "[T]he discovery stay and 30-day hearing requirement of section 425.16 literally applied in all cases might well adversely implicate a plaintiff's due process rights . . . . Motions under section 425.16 commonly will be filed early in the legal proceedings, before the plaintiff has the opportunity to conduct (or complete) significant and necessary discovery. If the plaintiff makes a timely and proper showing in response to the motion to strike, that a defendant or witness possesses evidence needed by plaintiff to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion to strike is adjudicated. . . . So construed, the statute does not violate a plaintiff's right to due process of law . . . ."

Lafayette Morehouse, Inc. v. Chronicle Pub. Co., 37 Cal.App.4th 855, 867-68 (1995) (emphases added) ("The trial court, therefore, must liberally exercise its discretion by authorizing reasonable and specified discovery timely petitioned for by plaintiff in a case such as this, when evidence to establish prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees"). Indeed, under the similar summary judgment rule, a continuance to allow discovery "must" be granted where "essential evidence ' may exist but cannot, for reasons stated, then be presented.'" Weil & Brown, *Civil Procedure*

Before Trial ¶10:207, at p. 10-57 (1996).

* * *

Dated: November 6, 1996.

JAMES B. HICKS
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DONOVAN LEISURE
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By /s/ James B. Hicks
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GORDANA SWANSON

APPENDIX "J'

California Code of Civil Procedure §425.16. Claim Arising From Person's Exercise of Constitutional Right of Petition or Free Speech -- Special Motion to Strike.

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

(b) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff

prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any time later upon terms it deems proper.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any other matters pertinent to the purposes of this action.

CERTIFICATE OF SERVICE

I certify that on Monday, April 28, 1997, I served three copies of the PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA on all parties required to be served, by depositing such copies in the United States mail, postage prepaid, in envelopes addressed to each of the following:

California Supreme Court
300 South Spring Street, Second Floor
Los Angeles, California 90013

California Court of Appeal, Second Appellate District
c/o Clerk of the Court, Division Three
300 South Spring Street, Second Fl., North Tower
Los Angeles, California 90013-1213

Presiding Judge for the Los Angeles Superior Court
(for the Hon. Mary Murphy)
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James B. Hicks

U.S.
MAY 27 1997
OFFICE OF THE CLERK

No. 96-1737

In The

Supreme Court of the United States

October Term, 1996

GORDANA SWANSON,

Petitioner,

vs.

DON KNABE,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent DON KNABE ("Knabe") respectfully sets forth herein his opposition to Petitioner GORDANA SWANSON's ("Swanson") Petition for Writ of Certiorari (the "Petition").

INTRODUCTION

In this Opposition, Knabe first seeks to point out why this matter should not be reviewed by the United States Supreme Court. Knabe then seeks to point out, pursuant to Supreme Court Rule 15(2), various misstatements of fact and law in the Petition that bear on what issues properly would be before the Court if certiorari were granted.

1. The Court Should Not Exercise Jurisdiction Over This Matter

Swanson asserts that this Court has jurisdiction to review the California Supreme Court's January 28, 1997 order denying review under 28 U.S.C. Section 1257(a) and Supreme Court Rules 10(a) and 10(c) (Petition, 2). As set forth below, the Court should not grant review under these provisions, or at all.

A. The Court Should Not Grant Review Based on 28 U.S.C. Section 1257(a)

Swanson claims in the "Jurisdiction" section of her Petition that this Court may review this case under 28

U.S.C. Section 1257(a) "since the California courts' application of California's SLAPP statute is unconstitutional, and therefore 'repugnant to the Constitution . . . of the United States' " (Petition, 2).

While Swanson argues that the Anti-SLAPP statute is unconstitutional, the statute has already withstood at least one comprehensive constitutional challenge in the California courts.

In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855 ("*More I*"), the California Court of Appeal, First District, determined that the statute, when properly construed, does not violate the right to trial by jury, does not deny due process and does not deprive plaintiffs of equal protection of the laws. Particular aspects of the court's findings in *More I* are set forth below under the appropriate subject headings.

B. The Court Cannot Grant Review Based on Supreme Court Rule 10(a)

Rule 10(a) contemplates Supreme Court review where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a decision by a lower court, as to call for an exercise of this Court's supervisory power."

As this case comes to the Court after making its way through the California state courts, and not through the federal courts or the United States court of appeals, Rule 10(a) does not apply.

C. The Court Should Not Grant Review Based on Supreme Court Rule 10(b)

Even though Swanson does not mention Supreme Court Rule 10(b) in the "Jurisdiction" portion of her Petition or elsewhere, if she had mentioned it, the Court should still not grant review under that rule.

Rule 10(b) contemplates Supreme Court review where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

1) The California Courts Did Not Decide an Important Federal Question, but Merely Ruled on the Scope of a State Procedural Statute

In declining to review the California Court of Appeal's decision affirming the trial court's dismissal of Swanson's SLAPP suit against Knabe, the California Supreme Court did not decide an important federal question. Indeed, a review of the appellate court ruling reveals that the appeal presented "an issue regarding the scope of the anti-SLAPP statute, [California] Code of Civil Procedure section 425.16" (Petition, 8a). Far from deciding an important federal question, the appellate

court merely ruled on a state procedural statute – a subject clearly not worthy of Supreme Court review.

2) The California Courts' Decision Does Not Conflict With the Decision of Another State Court of Last Resort

Even if the California Supreme Court action (by declining to review the Court of Appeal's decision) somehow involved an important federal question, its decision does not conflict with the decision of another state court of last resort.

Swanson argues that a "conflict between different states on the constitutionality of SLAPP statutes is dramatically shown by a recent opinion of the New Hampshire Supreme Court, which examined a proposed SLAPP statute modeled on California's version, and found that it would be unconstitutional." (Petition, 22, citing *Opinion of the Justices,* 138 N.H. 445, 641 A.2d 1012 (1994)).

Swanson grossly mischaracterizes the New Hampshire Supreme Court opinion in an attempt to create a conflict among the California and New Hampshire Supreme Courts. The New Hampshire decision focuses solely on the New Hampshire State Constitution, as evidenced by the questions presented:

> "1. Is the procedure for consideration of a special motion to strike, as proposed in SB 661, permitted by the provisions of the *New Hampshire Constitution,* Part 1, Article 20, which guarantees the right to trial by jury in civil cases?

2. Is the procedure proposed by SB 661 otherwise permitted by the *New Hampshire Constitution*?" (emphasis added).

Regardless of what the New Hampshire Supreme Court concluded, its ruling was limited to the New Hampshire Constitution, and thus it did not decide an important, or any, federal question. Accordingly, as neither the California nor the New Hampshire Supreme Courts decided a federal question in their consideration of their states' respective Anti-SLAPP statutes, there can be no conflict that brings Swanson's Petition within the ambit of Rule 10(b).

D. The Court Should Not Grant Review Based on Supreme Court Rule 10(c)

Rule 10(c) contemplates Supreme Court review where "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." As set forth above, the California Courts did not decide a question of federal law. Accordingly, review cannot be granted under Rule 10(c).

In addition, a cursory review of federal rights which Swanson claims were violated by the California Courts also reveals that there is no need for this Court to consider this matter further.

1) Swanson's Free Speech and Petition Rights Were Not Violated

Swanson argues that "[t]he California courts' rulings discriminate against [her] as a political candidate, and violate her constitutional rights of petition and free speech by refusing to allow her reasonable access to the courts to pursue her claims under the Political Reform Act" (Petition, 14). While Swanson claims that "the California courts focused on [her] status as a rival political candidate rather than on the nature of the defendant's conduct" (Petition, 14), the appellate opinion itself reveals that its focus was proper and need not be reviewed.

While the California courts clearly acknowledged that Swanson and Knabe were "rival candidates" (Petition 9a), and while that was an important consideration in determining Swanson's motives for bringing her lawsuit, the California courts primarily focused on the allegations of the Complaint and the alleged actions of Knabe.

Specifically, the California courts, guided by the statute itself and the clear authority of *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628 and other decisions, focused on whether Swanson's allegations arose "from any act of [Knabe] in furtherance of [his] right of petition or free speech under the United States or California Constitution in connection with a public issue." (Petition, 16a).

The California courts found that:

> "The statutory language is clear. A plaintiff's action is initially tested under section 425.16, subdivision (b). . . . This test only requires that the defendant establish the plaintiff's cause of action or complaint 'arises from' the defendant's valid exercise of free speech or petition rights concerning a matter of public interest. . . . Contrary to Swanson's assertion, the statute does not limit its application to only constitutionally protected activity. The Legislature did not intend 'that to invoke the special motion to strike the defendant must first establish its actions are constitutionally protected under the First Amendment as a matter of law. If this were so the second clause of subdivision (b) of section 425.16 would be superfluous because by definition the plaintiff could not prevail on its claim' " (Petition, 16a-17a, citing *Wilcox* and *Wollersheim*).

After accurately setting forth the proper test, the California courts found that Swanson's allegations "were made in connection with [Knabe's] campaign and fundraising efforts, both of which are First Amendment activities" (citing *Buckley v. Valeo* (1976) 424 U.S. 1) and that the "allegations affect the exercise of Knabe's free speech rights as a public official and as a candidate" (Petition, 17a).

After its lengthy recitation of the facts (Petition, 9a-15a) and its thorough analysis of the law (Petition, 15a-24a), the California courts properly concluded that "the trial court correctly determined that Knabe satisfied the threshold requirement that Swanson's action fell

within the ambit of the anti-SLAPP statute." (Petition, 17a-18a).

Among Swanson's other arguments in her Petition (many of which Knabe believes do not require a response), is Swanson's claim that "if a private citizen who was not a rival political candidate had filed the underlying action against Knabe . . . , there would be no question that such a lawsuit would not violate the SLAPP statute. . . . " (Petition, 17).

Because the California courts focused only in small part on Swanson's "rival candidate" status, and primarily on Knabe's alleged actions and the Complaint's allegations, the California courts would have reached the same result had *anyone* filed the Complaint. Swanson's claim of discrimination therefore cannot be taken seriously.

To the extent Swanson's discrimination claim is really an equal protection argument, the *More I* court found that the Anti-SLAPP statute does not violate the equal protection clause. There, where the plaintiff contended that "the statute infringe[d] upon its ability to access the judicial system and, thus, violated its right to equal protection" the court disagreed. The *More I* court stated, at 865, that "Statutes that classify litigants and impose differing procedural requirements are generally valid so long as classification is supported by a rational basis" (citing *Hung v. Wang* (1992) 8 Cal.App.4th 908, 925-926).

Accordingly, Swanson's claims that her free speech and petition rights were violated because of the restrictions on her access to the courts cannot be given any credence.

2) Swanson's Due Process Rights Were Not Violated

To the extent Swanson argues that her due process rights were violated by not being granted leave to conduct discovery (Petition, 18-22), it should be noted that the California appellate court ruling found that "Swanson could have conducted discovery if she had shown good cause and focused her requests to those that would enable her to get over the statutory procedural hurdle. . . . Swanson was not prevented from conducting discovery. . . . Swanson just refused to abide by the statutory limitations put on her requests. . . . " (Petition, 23a).

Consistent with the finding in the instant case, the court in *More I*, at 868, concluded that where a plaintiff does not make a timely and proper showing as to the need for discovery, "the statute does not violate a plaintiff's right to due process of law. . . . "

3) Swanson's Jury Trial Rights Were Not Violated

To the extent Swanson argues that her jury trial rights were violated (Petition, 18), it should be noted that the federal right to a jury trial in civil matters provided by the United States Constitution's 7th Amendment is not applicable to the states, so there is no federally protected right to a jury trial in state civil court proceedings. *See* Nowack, Rotunda & Young, *Constitutional Law*, 3d ed., 1986, 486, fn. 12 (citing *Minneapolis and St. Louis R.R. Co. v. Bombois* (1916) 241 U.S. 211).

In addition, the *More I* court found, at 867, that "Section 425.16 requires the plaintiff whose cause of action is subjected to that special motion to strike simply to demonstrate by affidavit a prima facie case. Thus, properly construed[,] section 425.16(b) does not violate the right to a jury trial."

2. The Court Should Note Swanson's Misstatements of Fact and Law

Pursuant to Supreme Court Rule 15(2), Knabe hereby brings to the Court's attention Swanson's numerous misstatements of facts and law that bear on what issues properly would be before the Court if certiorari were granted. For ease of reference, Knabe sets forth the Swanson misstatement(s) (underlining and numbering the misstated language) and then, using corresponding numbers, provides a brief explanation as to why Knabe perceives the language to be a misstatement of fact or law.

A. Swanson's Misstatements

"By dismissing petitioner Gordana Swanson's lawsuit under California's SLAPP statute [1] *because she was a rival political candidate,* and [2] *without giving her any opportunity to take discovery,*

1. Did the California courts violate Swanson's constitutional rights of free speech and petition, by [1] *focusing on her status as a rival political candidate rather than on respondent Don Knabe's alleged wrongful conduct?* . . .

3. Is the California SLAPP statute unconstitutional on its face (especially since [3] *the New Hampshire Supreme*

Court has already held that draft legislation modeled on California's statute would in fact be unconstitutional), and should certiorari be granted to resolve the [4] *growing conflict among the states on the constitutionality of SLAPP statutes?"* (Petition, i).

Reasons for Knabe Objection to Misstatements

[1] As discussed hereinabove, the lawsuit was not dismissed "because [Swanson] was a rival political candidate" of Knabe.

[2] As discussed hereinabove, Swanson was given an opportunity to take discovery. She could have done so upon a showing of good cause, but failed to make the necessary showing.

[3] As discussed hereinabove, the New Hampshire Supreme Court's ruling was based on the New Hampshire state constitution and thus is inapposite.

[4] As discussed hereinabove, there is not a "growing [nor any] conflict among the states."

B. Swanson's Misstatements

"QUESTION NO. 1: [1] *The California Courts . . . Focused On [Swanson's] Status as a Rival Political Candidate Rather Than On Respondent Knabe's Alleged Wrongful Conduct."*

"QUESTION NO. 3: [2] . . . *A Conflict Among the State Courts About the Constitutionality Of SLAPP Statutes"* (Petition, iv).

Reasons for Knabe Objection to Misstatements

[1] As discussed hereinabove, the lawsuit was not dismissed "because [Swanson] was a rival political candidate" of Knabe.

[2] As discussed hereinabove, there is not a "conflict among the states."

C. Swanson's Misstatement

[1] "Certiorari could also be properly granted under Supreme Court Rule 10(a)" (Petition, 2).

Reasons for Knabe Objection to Misstatement

[1] As set forth hereinabove, Certiorari cannot be granted under Supreme Court Rule 10(a).

D. Swanson's Misstatement

[1] "the provisions of California's SLAPP statute have already been found to be unconstitutional by the New Hampshire Supreme Court. . . . " (Petition, 3).

Reasons for Knabe Objection to Misstatement

[1] As set forth hereinabove, the New Hampshire Supreme Court's ruling was based on the New Hampshire state constitution and thus is inapposite.

E. Swanson's Misstatements

[1] [Swanson was deprived of] *"any opportunity to take discovery"* and [2] *the California*

> *Courts "focus[ed] on her status as a rival political candidate rather than on Knabe's alleged wrongful conduct. . . . "* (Petition, 3).

Reasons for Knabe Objection to Misstatements

[1] As discussed hereinabove, Swanson was given an opportunity to take discovery. She could have done so upon a showing of good cause, but failed to make the necessary showing.

[2] As discussed hereinabove, the courts did not focus on Swanson's status as a rival political candidate rather than on Knabe's alleged wrongful conduct.

F. Swanson's Misstatement

[1] "Because Knabe was a rival political candidate, the California courts held this lawsuit was subject to the SLAPP statute. . . . " (Petition, 4).

Reasons for Knabe Objection to Misstatement

[1] As discussed hereinabove, the California courts did not find Swanson's lawsuit to be a SLAPP "because Knabe was a rival political candidate."

G. Swanson's Misstatement

[1] "[T]he trial court ignored Swanson's objections . . . " (Petition, 8).

Reasons for Knabe Objection to Misstatement

[1] The trial court did not ignore Swanson's objections; it merely overruled them.

H. Swanson's Misstatement

[1] "the court dismissed Swanson's lawsuit with prejudice" (Petition, 11).

Reasons for Knabe Objection to Misstatement

[1] The court did not dismiss Swanson's lawsuit with prejudice; it merely granted Knabe's special motion to strike the Complaint, thereby dismissing the lawsuit.

Throughout the remainder of Swanson's Petition, from pages 12-25, Swanson repeats these same misstatements time and time again. As these misstatements are quite apparent, and as Knabe's objections thereto have been duly noted, Knabe will refrain from referring to each and every misstatement.

CONCLUSION

Based on the foregoing, Swanson's Petition for Writ of Certiorari should be denied.

Dated: May 27, 1997

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Supreme Court, U.S.
FILED
JUN 6 1997
OFFICE OF THE CLERK

No. 96-1737

IN THE
SUPREME COURT OF THE UNITED STATES
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Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court
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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the California courts violate Swanson's constitutional rights of free speech and petition, by focusing on her status as a rival political candidate rather than on respondent Don Knabe's alleged wrongful conduct?

2. Did the California courts also violate Swanson's due process and jury trial rights by denying her any discovery whatsoever, despite a necessary witness's stated desire to testify and produce documents under subpoena?

3. Is the California SLAPP statute unconstitutional on its face (especially since the New Hampshire Supreme Court has already held that draft legislation modeled on California's statute would in fact be unconstitutional), and should certiorari be granted to resolve the growing conflict among the states on the constitutionality of SLAPP statutes?

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No. 96-1737

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GORDANA SWANSON,
Petitioner,

vs.

DON KNABE,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

As detailed by Swanson's Petition, this proceeding questions the constitutionality of California's SLAPP statute because of the conflict between a plaintiff's constitutional rights and the abbreviated litigation schedule created by the SLAPP statute. Certiorari is necessary to protect the public's rights of free speech, petition, jury trial and due process in the application of California's new SLAPP statute. *See* Petition at pp. 14-24.

Knabe's opposition brief actually shows why certiorari should be granted, by saying "the California courts focused only in small part on Swanson's 'rival candidate' status." Opposition at p. 8. Whether the California courts focused on Swanson's political status "in small part"

or in large part may be open to dispute, but for the California courts to focus on it at all was a violation of Swanson's constitutional rights, since "the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). *See also NAACP v. Button*, 371 U.S. 415, 430 (1963) ("litigation may well be the sole practicable alternative open to a minority to petition for redress of grievances"); *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907)("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.").

Thus, for the reasons stated below and in Swanson's Petition, certiorari should be granted in order to "secur[e] to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right -- the liberty -- both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth." J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger*, at pp. 90, 99 (1963).

I. THE UNITED STATES SUPREME COURT HAS JURISDICTION

Despite Knabe's arguments, this Court has jurisdiction to grant certiorari since the California courts' application of California's SLAPP statute is unconstitutional, and therefore "repugnant to the Constitution . . . of the United States." 28 U.S.C. §1257(a). Although Knabe says "the appellate court merely ruled on a state procedural issue" (Opposition at pp. 3-4), the appellate decision specifically cites the *Buckley v. Valeo* case to support its ruling (Appendix "E" at p. 17a), showing that certiorari is appropriate because its ruling "was based squarely upon its interpretation of federal law." *Arizona v. Evans*, 514 U.S. __, 115 S.Ct. 1185, 131 L.Ed.2d 34, 43 (1995).

Similarly, although Knabe says "the California Supreme Court did not decide on an important federal question" (Opposition at p. 3), the Ninth Circuit has recently explained that when the California Supreme Court denies a petition for review, it has been given a fair opportunity to review the merits of the petitioner's claim. *Roman v. Estelle*, 917 F.2d 1505, 1506 (9th Cir. 1990). Thus, certiorari is proper under either Supreme Court Rule 10(b) or Rule 10(c).[1/]

II. CERTIORARI SHOULD BE GRANTED ON SWANSON'S FIRST QUESTION PRESENTED, SINCE THE CALIFORNIA COURTS VIOLATED SWANSON'S FREE SPEECH AND PETITION RIGHTS BY FOCUSING ON HER STATUS AS A RIVAL POLITICAL CANDIDATE

As explained in the Petition, the California courts discriminated against Swanson by imposing a more stringent burden on her as a rival political candidate under the SLAPP statute. This violated Swanson's First Amendment rights, including her right of free speech (*Buckley, supra*, 424 U.S. at 15), and her right of access to the courts. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). *See* Petition at pp. 14-18.

Knabe's Opposition practically concedes to the existence of this constitutional violation by admitting that "the California courts focused . . . on Swanson's 'rival candidate' status" -- albeit supposedly "only in small part." Opposition at p. 8. But despite Knabe's attempt to belittle this constitutional issue, "the constitutional guarantee [of free speech]

[1/] Swanson apologizes for the typographical error on page 2 of her Petition, at which she cites Rule "10(a)" rather than 10(b). This error is pointed out repeatedly by Knabe. *See* Opposition at pp. 2-3, 12.

has its fullest and most urgent application precisely to the conduct of campaigns for political office" (*Buckley, supra*, 424 U.S. at 15), because one of its primary goals is to preserve an "unfettered interchange of ideas for the bringing about of political and social change." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Knabe also cites at page 6 to the California courts' emphasis on Knabe's "fund-raising efforts" as First Amendment activities -- even if they are used to conceal bribes -- but surely it evokes Alice's Wonderland to say that Knabe's right to engage in fund-raising activities somehow trumps Swanson's rights of free speech and access to the courts. Indeed, the Florida Supreme Court has recognized the damages of just such an over-enthusiastic application of SLAPP provisions, since they "seem to extend to [a defendant's] activities a broader protection then the constitution itself provides." *Florida Fern Growers Assn. v. Concerned Citizens of Putnam County,* 616 So.2d 562, 570 (Fla. 1993). Certiorari is appropriate for this reason alone, since "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

The bottom line is that Swanson sued Knabe for taking bribes under the California Political Reform Act, and "[a]ny chilling effect . . . that flows from good-faith enforcement of this valid statute would not, of course, constitute that enforcement an impermissible invasion of protected freedoms." *Cameron v. Johnson*, 390 U.S. 611, 619 (1968). In this era of intense public interest in questionable political contributions, Swanson should have been allowed to pursue her information and take discovery on whether Knabe was taking bribes as a public official, and so certiorari should be granted to preserve our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co., supra*, 376 U.S. at 270.

III. CERTIORARI SHOULD ALSO BE GRANTED ON SWANSON'S SECOND QUESTION PRESENTED, SINCE THE CALIFORNIA COURTS VIOLATED SWANSON'S DUE PROCESS RIGHTS BY NOT ALLOWING HER TO TAKE ANY DISCOVERY

As Swanson's Petition explains, prior to this litigation Swanson's campaign consultant Ron Smith met with"Dan Wooldridge, the former partner of defendant Don Knabe's campaign consultant Harvey Englander":

> "During these meetings, Mr. Wooldridge told me that Mr. Englander had funneled large sums of money, probably over $25,000 and perhaps as much as $100,000, to Don Knabe by means of phony payments to a dummy company called 'JDK Associates' or 'J.D. Knabe & Associates' controlled by Mr. Knabe's wife, Julie Knabe. Mr. Wooldridge also told me that he had written evidence to back up his statements, and he briefly showed me a copy of a ledger page showing payments to Ms. Knabe's company."

Smith Decl. ¶¶1-2 (AA75). Smith testified that he "tried to obtain a written statement from Mr. Wooldridge to this effect, and . . . also tried to get copies of his supporting documents, but [Mr. Woolridge] told me that he would be willing to respond only to a subpoena." *Id.* *See* Petition at pp. 6-7.

Yet the California courts precluded Swanson from enforcing this subpoena or any other discovery -- discovery which would have allowed her to try to show the alleged bribes which Knabe accepted. This Court has held that a premature dispositive motion cannot be granted without allowing the responding party an opportunity to take

necessary discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (summary judgment case); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986) (summary judgment should "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition"). Similarly, Swanson's due process rights were violated by dismissing her claims without allowing her to take any discovery under California's SLAPP statute. *See* Petition at pp. 18-22.

Knabe again tries to minimize the constitutional issue, by claiming that the California "appellate court merely ruled on a state procedural statute -- a subject clearly not worthy of Supreme Court review." Opposition at pp. 3-4. By Knabe's analysis, a Jim Crow statute is also just a "state procedural statute" -- but in any event, what the appellate court <u>really</u> said was that Swanson's claim that "discovery was necessary to oppose Knabe's motion to strike" simply "d[id] not constitute sufficient good cause" to allow her to take that discovery. Petition, Appendix "E" at p. 23a.

Such a ruling directly contradicts this Court's holding in the analogous summary judgment context, that a dispositive motion must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition." *Anderson v. Liberty Lobby, supra*, 477 U.S. at 250 n.5. This rule is especially applicable in a SLAPP context, since SLAPP motions are not generally governed by a summary judgment motion's due process limitations, such as forbidding the trial court from resolving the merits of disputed factual claims. Thus, although SLAPP statutes are designed to protect a defendant's constitutional rights, an overbroad SLAPP procedure "would seem to extend to these activities a broader protection than the constitution itself provides," and would deny a plaintiff her right of "access to the courts." *Florida Fern Growers Ass'n, supra,* 616 So.2d at 570.

Knabe next relies on the California appellate court's statement that supposedly "Swanson could have taken discovery if she had shown good cause and focused her requests to those that would enable her to get over the procedural hurdle." Opposition at p. 9, citing Petition, Appendix "E" at p. 23a. Knabe's argument is disingenuous, since the California court based its ruling on a false premise, *i.e.*, that Swanson's discovery supposedly focused on "an extensive list of, inter alia, communications, bank accounts, campaign contribution records, checks and payments." Petition, Appendix "E" at p. 20a.

Actually, most of Swanson's requested discovery was directed toward three banks, from whom she merely requested "checks," "drafts," and "payments" drawn on Knabe's campaign manager Harvey Englander's or his companies' bank accounts, and made payable to Knabe, his wife, or the two "dummy compan[ies]" named by third-party witness Dan Wooldridge. AA98-99, 106-07, 114-15. It is hard to see how these requests could have been more specifically drafted, since they sought precisely the payment "funneling" information previously identified by Mr. Wooldridge. See above at page 5.

And in any event, it is undisputed that Swanson's "counsel requested leave to take more limited discovery, but his offer was rejected by the Court." AA83-84; *see* Petition at p. 9. The Petition explains in detail how Swanson practically banged her head against the wall by repeatedly requesting leave to take more limited discovery -- only to have the trial court reject her request each and every time. *See* Petition at pp. 7-12.

Knabe finally argues the SLAPP statute could not have violated Swanson's constitutional rights, because "the statute has already withstood at least one comprehensive constitutional challege in the California courts." Opposition at p. 2, citing *Lafayette Morehouse, Inc. v. Chronicle Pub. Co.*, 37 Cal.App.4th 855 (1995). Yet Knabe does not cite a single reported California case which has actually held that a

plaintiff should be allowed to take discovery, or which has reversed a SLAPP dismissal for lack of discovery or other due process reasons, and Swanson is also not aware of any such case.

The simple truth is that even if the California SLAPP statute could be construed to be constitutional, it was used in this case to deprive Swanson of any opportunity to take necessary discovery and therefore violated her due process rights -- and in no reported California case has it ever actually allowed a plaintiff to take her requested discovery. Certiorari should therefore issue because the SLAPP statute is unconstitutional both on its face, and as it was applied by the California courts in this action.

IV. CERTIORARI SHOULD FINALLY BE GRANTED ON SWANSON'S THIRD QUESTION PRESENTED, SINCE IT IS NECESSARY TO RESOLVE A CONFLICT AMONG THE STATE COURTS ABOUT THE CONSTITUTIONALITY OF SLAPP STATUTES

Although Knabe emphasizes the California courts have decided that state's SLAPP statute pretty much meets all constitutional requirements (Opposition at p. 2), the New Hampshire Supreme Court has specifically examined a proposed SLAPP statute modeled on the California version, and found that it would be unconstitutional. *Opinion of the Justices*, 138 N.H. 445, 641 A.2d 1012 (1994).

Knabe says this "decision focuses solely on the New Hampshire State Constitution." Opposition at p. 4. The court did emphasize a plaintiff's right to a jury trial under the New Hampshire Constitution (as explained by Swanson's Petition at p. 22), but the case also dealt with a plaintiff's right of access to the courts (641 A.2d at 1013) -- and Knabe does not dispute that this concern was echoed by the Florida

Supreme Court in its *Florida Fern Growers* case. 616 So.2d at 570.

Certiorari is necessary to resolve this conflict, since "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the . . . state courts concerning the meaning of provisions of federal law." *Braxton, supra*, 500 U.S. at 347. Especially given this Court's statement in the *Liberty Lobby* case that a dispositive motion must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to her opposition" (477 U.S. at 250 n.5), certiorari should issue to clarify and resolve this legal conflict between different states.

V. CONCLUSION

Certiorari is necessary to protect a plaintiff's rights under SLAPP statutes, to resolve the conflict between state courts on the constitutionality of SLAPP statutes, to give guidance to courts in dealing with SLAPP statutes across the country -- and also to protect the constitutional rights of an individual, *i.e.*, Swanson. *See New York Times, supra*, 376 U.S. at 269 (recognizing an obligation to preserve "the opportunity for free political discussion to the end that government may be responsive to the will of the people"); *Chambers, supra*, 207 U.S. at 148 ("The right to sue . . . lies at the foundation of orderly government").

Dated: June 1997.

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CERTIFICATE OF SERVICE

I certify that on Thursday, June 5, 1997, I served three copies of the REPLY TO BRIEF IN OPPOSITION on all parties required to be served, by depositing such copies in the United States mail, postage prepaid, in envelopes addressed to each of the following:

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